

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

JOINT APPENDIX

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA *United States Court of Appeals
For the
District of Columbia Circuit*

FILED JAN 30 1953

No. 11,624

Joseph W. Stewart

CLERK

JONATHAN WOODNER COMPANY, a corporation,
Appellant,

v.

ERNEST W. MATHER, *Appellee.*

996

Appeal From the United States District Court for the
District of Columbia

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JOINT APPENDIX

**PLEADINGS, DOCKET ENTRIES AND
OTHER PAPERS**

315

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Filed Jul 19 1950

ERNEST W. MATHER, 1116 F Street, N. E., Washington, D.C.,
Plaintiff

v.

JONATHAN WOODNER COMPANY, a corporation, 1200 18th
Street, N. W., Washington, D. C., *Defendant*

Amended Complaint

*(Damages for Personal Injuries as the Result of
Negligence of Defendant)*

1. The claim for relief herein on behalf of the plaintiff, Ernest W. Mather, against the defendant, Jonathan Woodner Company, a corporation, is in an amount in excess of \$3,000.00, and is within the jurisdiction of this Court.

2. On February 20, 1950, at or about 8:30 a.m., plaintiff, Ernest W. Mather, was employed by Colonial Electric Company, Inc., a sub-contractor, and was lawfully on premises at or near University Lane at Colesville Road, Prince George County, Maryland, upon which premises defendant, Jonathan Woodner Company, a corporation, general contractor, was constructing an apartment house.

3. That said plaintiff, Ernest W. Mather, was at said time a resident of the District of Columbia, employed by the Colonial Electric Company, Inc., a corporation having its principal place of business and doing business in the District of Columbia and its environs and said Ernest

Mather entered into an employment agreement with the said corporation in the District of Columbia and was employed from June 16, 1949, until the date of the accident aforesaid, February 20, 1950, predominantly in the 316 District of Columbia as an electric wireman and was temporarily assigned by the aforesaid corporation to perform electrical work on the project stated in paragraph 2 herein. That at all times while so employed by the aforesaid corporation and while employed on the construction job indicated in paragraph 2, said plaintiff was subject to the control and orders from his company in the District of Columbia.

4. At said time and place, at the request of defendant, by its agents, servants and employees, plaintiff climbed a pole for the purpose of cutting certain electrical wiring, when, as a result of the carelessness and negligence on the part of said defendant, by its agents, servants and employees, in undermining said pole by removing the dirt surrounding it, and as a result of said defendant's failure to warn plaintiff of said dangerous condition, said pole collapsed, throwing the plaintiff to the pavement, with great force and violence, thereby causing him to sustain great physical injury.

5. That said plaintiff, pursuant to the requirements of the Longshoremen's and Harbor Workers' Compensation Act in the District of Columbia, filed a notice of election to sue the defendant herein, third party tortfeasor. Copy of said notice is attached hereto and made a part of this complaint.

6. The injuries sustained by said plaintiff consisted of numerous contusions and bruises about his arms, legs and body, and he sustained a comminuted fracture of his right patella, with permanent injuries to his right knee and muscles, tissues and ligaments thereof and with permanent injuries to his right leg and he sustained a comminuted fracture of the lower end of his left tibia and with permanent injuries to his left leg and his nervous system was

shocked and permanently injured and he suffered and will in the future suffer great physical pain and mental anguish and he incurred and will in the future incur substantial expense for hospital, medical, surgical and nursing treatment in an effort to correct such injuries, and he lost time from his work with a large loss of earnings and his earning capacity has been injured, all to his damage in the sum of \$35,000.00, plus costs.

317 WHEREFORE, the plaintiff demands judgment against the defendant in the sum of \$35,000.00, besides costs.

ERNEST MATHER
Ernest Mather

* * * * *

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Exhibit

COPY

DISTRICT OF COLUMBIA WORKMEN'S COMPENSATION ACT
OFFICE OF DEPUTY COMMISSIONER
WASHINGTON, D. C.

NOTICE OF ELECTION TO SUE (Disability or Death Claim)

(To be submitted in duplicate to Deputy Commissioner)

1. Name of employer: Colonial Electric Company
2. Office Address: 925 New York Avenue, N. W.
3. Name of injured or deceased: Ernest W. Mather
4. Address: 1116 F Street, N. E., Washington, D. C.
5. Date of accident: Feb. 20, 1950. Date Disability Began: Feb. 20, 1950
6. Place of accident: University Lane & Colesville Road.
7. Average daily wage: \$14.00 a day.
8. Cause of accident: Pole fell with Mr. Mather throwing him to asphalt street.

9. Nature of injury: Comminuted fracture of the right patella, or knee cap, and a comminuted fracture of the lower end of the left tibia

10. Name of attending physician: Dr. Allen Lloyd

11. Address: 1822 R Street, N. W., Washington, D. C.

12. I, or the undersigned, hereby elect under section 33 of the Longshoremen's Compensation Act to pursue my remedy against a third party, to wit: Jonathan Woodner Co., Inc., but make claim for compensation for any deficiency between the amount so recovered and the amount provided by the said act, and in support of my claim make the foregoing statement of facts.

My attorney's name is LUBAR, O'KEEFE, FRIEDLANDER & MELROD, 200 Woodward Building, Wash., D. C.

Dated: March 24, 1950

/s/ ERNEST W. MATHER
1116 F Street, N. E.,
Wash., D. C.

319

Filed Aug 23 1950

Answer of Defendant to Amended Complaint

FIRST DEFENSE:

1. The averments of paragraph 1 are denied.
2. The averments of paragraph 2 are admitted.
3. The averments of paragraph 3 of the amended complaint are denied.
4. The averments of paragraph 4 of the amended complaint are denied.
5. The averments of paragraph 5 of the amended complaint are admitted. This defendant does not admit that the filing of the notice of election in said paragraph described had any affect to give the plaintiff a right to bring this action against the defendant.
6. The averments of paragraph 6 of the amended complaint are denied.

SECOND DEFENSE:

7. And for a further defense to the action of the plaintiff herein, this defendant says that such injuries or damages suffered by the plaintiff as are described in the amended complaint, were caused in whole or in part by the negligence of the said plaintiff himself.

320 THIRD DEFENSE:

7. And for a further defense to the amended complaint herein, this defendant says that the said plaintiff assumed the risk of injury or damage suffered by him and described in the complaint by reason of his employment.

FOURTH DEFENSE:

8. And for a further defense herein, this defendant says that if the plaintiff was injured by reason of the wrongful or negligent conduct of any person, the same was committed by a fellow-servant, and by reason thereof the injuries and damages, if any there be, suffered by the plaintiff are not recoverable against this defendant.

FIFTH DEFENSE:

9. And for a further defense to the action of the plaintiff herein, this defendant says that at the time and place the plaintiff alleges he was injured, this defendant was engaged in the performance of a contract wholly within the State of Maryland and was required by the laws of the State of Maryland to be responsible for workmen's compensation to the employees of the Colonial Electric Company, including the plaintiff, as well as to this defendant's own direct employees, and in consideration thereof the laws of the State of Maryland in such case made and provided specifically provide that the remedy of the plaintiff to seek and obtain compensation before either the Workmen's Compensation Commission of the State of Maryland or before the U. S. Employees' Compensation Commission in the District of Columbia is exclusive and the plaintiff, therefore, has no cause of action against this defendant as a third

person by reason of any of the matters and things in the amended complaint set forth.

BRANDENBURG & BRANDENBURG

By: THOMAS S. JACKSON,
Attorneys for the Defendant,

* * * * *

326

Filed Jun 16 1952

Verdict and Judgment

This cause having come on for hearing on the 11th day of June, 1952, before the Court and a jury of good and lawful persons of this district, to wit:

Virginia B. Kettler	Peggy V. Evans
Stanley A. Abrams	Helen H. Garrett
Charles Sosnik	Stanley D. Marks
Francis A. Amoroso	Edward A. Curry
Adalyn A. Holmes	William C. Lyles
John T. Smith	Ralph E. Curts

who, after having been duly sworn to well and truly try the issues between Ernest W. Mather, plaintiff and Jonathan Woodner Company, a Corporation, defendant, and after this cause is heard and given to the jury in charge, they upon their oath say this 16th day of June, 1952, that they find the issues aforesaid in favor of the plaintiff and that the money payable to him by the defendant by reason of the premises is the sum of Twenty Thousand Dollars (\$20,000.00)

WHEREFORE, it is adjudged that said plaintiff recover of the said defendant the sum of Twenty Thousand Dollars together with costs.

HARRY M. HULL, *Clerk,*

By GEORGE A. WATTS
Deputy Clerk.

By direction of
Judge Matthews

328

Filed Oct 13 1952

Order

Upon consideration of the motion of the defendant for judgment n.o.v. or for a new trial and after oral argument heard thereon in open Court, it is this 13th day of October,

ORDERED AND ADJUDGED:

That the motion be and the same is hereby denied.

BURNETA SHELTON MATTHEWS
Judge

SEEN:

THOMAS JACKSON, per FL

* * * * *

329

Filed Oct 13 1952

Notice of Appeal

Notice is hereby given this 9th day of October, 1952, that Jonathan Woodner Company, defendant herein, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 16th day of June, 1952 in favor of Ernest W. Mather against said Jonathan Woodner Company, and from the denial of the motion for judgment n.o.v. or for a new trial entered October 13, 1952.

BRANDENBURG & BRANDENBURG
By: THOMAS S. JACKSON
Attorney for Defendant
Na. 0480

LEONARD S. MELROD, Esq.,
Attorney for plaintiff

* * * * *

PROCEEDINGS.

(After jury sworn and opening statements made by counsel to the jury, which portions not transcribed on request of counsel, the following proceedings were had:)

Thereupon, **Ernest W. Mather** was called as a witness on his own behalf, and having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Melrod:

Q. Will you state your full name? A. Ernest W. Mather.

Q. Where do you live? A. 1116 S Street, Northeast.

Q. How long have you lived here in the District of Columbia? A. Since 1947.

Q. Back on February 20, 1950, were you living in the District of Columbia? A. I was.

Q. And you lived continuously from 1947 until the present time in the District of Columbia? A. Yes.

Q. On February 20, 1950, where were you employed? A. I was employed by the Colonial Electric Company at Colesville Road and University Lane, apartment project—

Q. You were working on that project? A. Yes, sir.

Q. How long had you been working for the Colonial Electric Company? A. Since June 16, 1949.

Q. Where were you hired? A. I was hired in the District of Columbia. I reported to a job in the District of Columbia, 54th Street Northwest.

Q. How long did you work at that job? A. I was there off and on for a couple of months.

Q. Did you work for the Colonial Electric Company all of the time continuously until February 20th? A. Yes.

Q. Where does that company have its office? A. At the time I started out my employment was 925 New York Avenue Northeast and then he went to 2500 block of Bladensburg Road Northeast.

Q. At all times their office was in the District of Columbia? A. Yes.

Q. Mr. Mather, we are inquiring about an accident that occurred on February 20, 1950. Were you involved
5 in an accident on that date? A. Yes.

Q. What time of day did it occur? A. Approximately 8:15 in the morning.

Q. What time did you report to the job that morning?
A. 7:30.

Q. What was the nature of the work that you were doing on the job? A. Up before that day we had finished up the wiring of the project. We had been hanging fixtures and putting on plates and switch covers, up until that day.

We were supposed to start back in on the same thing that day but another job came up.

Q. What was your experience, Mr. Mather, prior to February 20, 1950 with respect to electrical work and wiring?

A. I was a lineman for 18 months in Nebraska, Kansas and Missouri.

* * * * *

I was employed for 18 months by Inland Construction Company in Omaha, Nebraska, for approximately 18 months; and we worked in Kansas, Nebraska,
6 Missouri and Iowa as a lineman.

* * * * *

Q. Tell us what happened that morning when you went to work on the job. A. Well, one of Woodner's men came in there—a man by the name of Sid Propfs.

Q. You say one of Woodner's men came in by the name of Sidney Probst. Do you know what capacity he was employed by the Woodner Company? A. He was a foreman.

* * * * *

7 Q. Tell us what happened. A. Well, he asked us to get the pole out of the way, as they were pouring a curb in there that morning.

The road had already been built and they was wanting to build the curb, and the pole was in the way. They wanted to know if we would take the wire off of it so they could get the pole out of the way.

Q. You say that "they"—you referred to the pronoun, "they". Who else was he speaking to besides yourself?

A. A. C. Chasen and a man by the name of Pierce. I don't know his first name.

Q. Who was Mr. Chasen and who was Mr. Pierce? A. Mr. Chasen was foreman for Colonial Electric Company and Pierce was an employee like myself.

Q. Where did you have this conversation with Mr. Propst, the foreman of the Jonathan Woodner Corporation? A. We had it in the basement of one of the apartments in which we kept our tools. We came in before 7:30 and we went to work from that tool room.

8 Q. After you had that conversation with Mr. Propst, what did you do? A. Well, I had my line-man hooks in my tool box and I got those out and buckled them on.

Chasen, he went to another building to put fuses in the main service, so when we killed that line that they would have lights in that building, because a switch that was temporary fed that building with temporary lights.

He was going to do that and Pierce and I were going to take the wires off the pole.

Q. Tell us what Mr. Pierce did. A. Pierce went over to the switch, temporary, and turned the current off and he gave me the okay that the current was off and I went up the pole.

Q. Where was this switch that Mr. Pierce went to to turn off the current with relation to the pole that you climbed? A. It was about forty yards from the pole that I was on.

Q. And could you see Mr. Pierce from where you were standing at the pole? A. Yes.

Q. And did he give you some indication that the switch had been turned off? A. Yes. He hollered at me and told me that the current was off.

Q. Tell the jury, if you know, what kind of a pole this was and how the wires were attached to it. A. I don't know exactly what kind of wood it was. It had been cut out of a tree. It was a tree that had been cut down and trimmed up.

It was approximately 27 or 28 feet in height and there was 8 wires attached to the pole running from 4 angles. Two run from the switch to the pole and two wires run from the pole to the office and two more sets of wires would run to the apartment which we had our tool room in.

Two more run to the building that had a little cafe in it for the lunchroom for the men to eat that didn't bring their lunches on the job.

Q. Did you originally put that wire on the pole? A. I did.

Q. You did? A. Yes.

Q. Tell the jury when you originally installed the wire—was the pole already set in the ground? A. Yes.

Q. And when you climbed the pole to go up it for the purpose of installing the wire, was there anything supporting the pole? A. No.

Q. In your experience as a lineman in doing wire work, do you know how deep a pole should be set in the ground; a pole of this size? A. A pole that size should be from 4½ to five feet. The longer they get the deeper.

Q. The longer the pole, the deeper? A. Yes, sir.

Q. When you climbed the pole the very first time for the purpose of installing the wire, was the pole secure? A. Yes.

Q. And did you do that by yourself or in association with anyone else? A. There was another man with me.

Q. What did he do? A. The first thing, we had to get the insulators on, and he handed me the insulators and I put those on, and then we put the wire on.

Q. You were the one that climbed the pole and actually installed the wire? A. Yes, sir.

Q. What was that pole there for and what were these wires attached to the pole for? A. They were put
11 on there for the carpenters to have their scale saws and lights for different buildings, temporary lights while they were getting the building wired and all finished.

Q. Getting back to the date of the accident, on February 20th, on that morning was the weather clear? A. Yes, sir.

Q. When you went to climb the pole did you notice anything unusual about the pole? A. No, I didn't.

Q. Did you look at the pole? A. Yes. I shook it. It felt steady to me.

Q. And you shook it before you went up? A. Yes, sir.

Q. And it seemed steady to you? A. Yes.

Q. And then did you proceed to climb the pole? A. Yes.

Q. Did you have any spikes or other things on your legs to assist you in climbing? A. I had the spikes on, yes.

Q. How far did you climb up the pole in starting to cut the wires? A. I had my right hand on top of the pole.

Q. In other words, you were at the very top of the
12 pole? A. Yes.

Q. And were holding—A. With my right hand.

Q. To the top? A. Yes, sir.

Q. Tell us exactly—tell the jury and the court just exactly what you did. A. I cut the two wires running to the switch first.

Q. And then what did you do? A. Then I cut the two wires that run to the office.

Q. And then what happened? A. The pole went over into the street.

Q. The pole fell into the street? A. Yes, sir.

Q. This pole, Mr. Mather: Tell the jury what its relationship was—that is, where it was embedded with relation to the street itself. A. The pole was right next to the street.

Q. Did Mr. Propst tell you for what reason the Jonathan Woodner Corporation wished to remove the pole? A. They wanted to pour a concrete curb in there.

Q. Tell us what happened as the pole started to come down. A. As the pole started to go over the street
13 I tried to climb down but I didn't have enough time. It went over too quick.

Q. What happened to you? A. I don't know exactly how I fell. I don't know what position I was, but I must have fell on my ankle and my knee.

Q. Were you knocked unconscious? A. No, I wasn't.

Q. Tell the jury, if you know, what kind of wire was connected to this temporary pole. A. It was No. 12 synthetic T. W.

Q. Was that the usual wire that is used for that kind of temporary wiring? A. It was the right size and everything. It is all right to use it for temporary work. It is not permanent outside wire.

Q. What did you say—synthetic? A. T.W. Synthetic covered wire.

Q. Does the wire have anything to do with the supporting of the pole itself? A. No.

Q. In other words, all of these telegraph or telephone poles, including this one, are supported by the depth that they are placed in the ground and the earth around
14 them; is that correct? A. That is right.

Q. Is it true or not, regardless of the manner in which you cut the wires, that would have no effect whatever if the pole were properly embedded in the ground? A. No, it wouldn't make no difference.

Q. Were you able to see, Mr. Mather, by looking at the pole, whether or not it was sufficiently in the ground? A. No, I didn't get a chance to look at it. Just as soon as I fell—they took—

Q. I don't mean afterward. Before-hand, was there anything that could appear to you before-hand that would

indicate to you that this pole wasn't sufficiently embedded in the ground? A. I couldn't see no line on it or anything.

Q. There was no mark that you could see on it? A. No.

Q. After you fell, did both legs strike the pavement or how did you actually fall; do you know? A. I don't know that.

Q. What happened to you after that? A. Pierce came to me right away. He was right close to me when I fell.

Then Chasen came around the building about the
15 time I fell and they picked me up and I told them to take me down and put me in the shed; I didn't think I was hurt. They taken me on to the hospital.

Q. Were you removed to the hospital? A. Yes.

Q. Do you know or can you tell the jury what the position of the pole was with respect to how it was lying in the highway when you fell? A. I tried to get up first and the pole was on the right side of me when I was trying to get up.

Q. Was the street which the pole fell into paved or not? A. It was asphalt covering. I don't know what ingredients that has. It is called asphalt.

Q. You fell onto that? A. Yes, sir.

* * * * *

42 Q. Mr. Mather, I negelected to ask you two other questions when you finished yesterday.

When you were requested by Mr. Propst, the fore-
43 man of the Woodner Corporation, to cut the wires on that pole, did he request you or were you asked to remove the pole itself? A. No. We were to get the wire off of it. We weren't supposed to do anything to the pole.

Q. You were not supposed to do anything to the pole itself? A. No.

Mr. Melrod: You may inquire.

Cross Examination

By Mr. Jackson:

Q. Mr. Mather, on the day of this accident when Mr. Propst came to request the removal of the wires, who was present? A. Mr. Chason, Mr. Pierce, Propst and myself.

Q. And Mr. Chason was who? A. He was foreman for Colonial Electric Company.

Q. He was foreman for the Colonial Electric Company? A. Yes.

Q. And Mr. Propst was addressing his remarks to Mr. Chason, wasn't he? A. Yes, sir.

Q. And Mr. Chason sent you out to do the job? A. We all went out of the building at the same time. We
44 discussed the job, what each one was supposed to do. Mr. Chason was supposed to go to one building to fuse up a switch. If I remember right, it was a 400-am switch, one of the buildings that wire was running to, temporary.

Q. And he assigned Mr. Chason to do a job in some different place, didn't he? A. Beg your pardon?

Q. Mr. Chason assigned Mr. Pierce to do a job in some other place? A. He and I were to go together.

Q. You and Pierce were to go together? A. Yes, sir.

Q. And Pierce's job was to be what? A. He was to turn the switch off.

Q. His job was to turn off the current? A. Yes, sir.

Q. To enable you to work on the wires without being electrocuted? A. Right.

Q. That was his sole function? A. He was to turn off the switch and I was to go up the pole and take the wires off.

Q. Was his sole function to turn off the switch? A. Yes, sir.

45 Q. What was he supposed to do after he turned off the switch? He wasn't going to turn it on again?

A. No.

Q. What was he going to do? A. He came back to the pole.

Q. Was he just standing by the pole when you fell? A. Yes.

Q. Not doing anything? A. No.

Q. He didn't put a wire or rope on the pole, did he?
A. No.

Q. And you didn't ask anybody to put a wire or rope on the pole? A. No.

Q. Now, Mr. Mather, did you look at that pole before you climbed it? A. Yes, I looked at the pole.

Q. Are you sure you looked at it? A. Positive.

Q. You are positive you looked at it? A. Yes.

Q. What did you see? A. I didn't see anything.

46 Q. Didn't see anything? A. No ground mark or anything.

Q. You didn't see any dirt? A. No.

Q. On the pole; no dry dirt? A. No.

Q. Do you remember testifying at my office on deposition on January 12, 1952? A. Yes, sir.

Q. I show you questions and answers on page 21, Mr. Mather:

"Q. Did you examine the pole before you started to climb it? "A. Well, as I was going up I knew it was steady. It seemed steady by climbing, by my weight. It was not too much, but it seemed steady to me."

By that answer, did you imply that you examined the pole or that you merely determined it was steady by the feel of it as you climbed? A. As I approached the pole, as far as the dirt was concerned, I didn't see any.

Q. That is a different thing than you said a minute ago. You said you examined the pole and didn't see anything. The fact is you didn't see anything, as I understand it?

A. As far as the dirt mark where it was supposed to
47 sit in the ground at four and one-half feet.

Q. You testified on direct examination, as I recall, that you stood there and shook the pole or attempted to shake it. A. Oh, no.

Q. You didn't do that? A. The way I did: When you start up a pole—when I put my hooks in it, it was steady and as I climbed up, it was steady.

Q. As you climbed up, it was steady so far as you could determine? A. Yes, sir.

Q. And it is not true, then, that you shook the pole or attempted to shake it before you went up it? A. I didn't shake it, no.

Q. And you did not intend to tell the jury on direct examination that you did shake it? A. How is that?

Q. It was not your intention to tell the jury on direct examination that you shook it or attempted to shake it before you went up? A. Just like I said: The way I tested and I put my hooks in it, and there was no vibration. Well, there might have been a slight vibration but not to
48 say the pole was sitting in the ground six inches.

Q. You don't know whether the pole was in the ground six inches or six feet? A. I saw the pole set.

Q. You saw the pole set? A. Yes.

Q. And you knew that it was in the hole properly when that was first set in there? A. That is right.

Q. You put the wires on it? A. I did.

Q. Now, Mr. Mather, you were once a lineman, were you not? A. That is right.

Q. Where were you a lineman? A. For Inland Construction Company.

Q. Inland Construction Company? A. Yes.

Q. What is a lineman? A. A lineman can be for telephone or electricity or—they climb poles, put insulators on; string wire.

Q. And a lineman is supposed to be a person who knows how to climb a pole? A. That is right.

49 Q. And knows what is to be done? A. That is right.

Q. And is familiar with the practices in the trade of taking down a pole or removing wires from a pole?

Mr. Melrod: You are asking him a series of questions. Ask him one at a time. You are asking him all these different things. I think he should ask him one question and let him answer it.

The Court: Objection is sustained.

By Mr. Jackson:

Q. A lineman is a special trade, isn't it? A. Yes.

Q. And a person who is a lineman is familiar with the customs and usages of removing wires from a pole? A. My work as a lineman was new work, new line work. We never did take no poles down or take any wire down.

Q. You were a lineman, however? A. That is right.

Q. You mean to tell me this is the first time you had ever removed wires from a pole? A. No. This work that I was doing at the present time for Colonial Electric was different than I did for the REA in Missouri and Iowa and Nebraska.

Q. You considered yourself competent to take the
50 wires off that pole, did you? A. Sure.

Q. Let me ask you if that fairly states the custom in electrical line work with respect to the climbing of poles and ladders and so forth, and I am reading the safety rules for the operation of electric equipment and lines comprising Part 4 of the Fifth Edition of the National Electrical Safety Code issued by the Bureau of Standards under the auspices and with the approval of the American Standards Association.

I am reading from page 50, paragraph 541A:

"Precautions to be observed before climbing structures.

"Before climbing poles, ladders, scaffolds or other elevated structures, first assure yourself that the pole, ladder, scaffold, tree, cross-arm, messenger wire, wire cable car, chair or other elevated support is strong enough to safely sustain your weight."

Does that fairly state the rule of conduct in your trade?

A. Yes.

Q. Let me ask you this further one, if this fairly states a rule of safety in your trade: "On pole replacement work, no pole shall be climbed for the purpose of clearing it of
all wires and cables without first guying or bracing the
51 poles securely." Does that state a fair safety rule

and custom in your trade? A. Well, at the time of this I was not a lineman. But it is a safety rule.

* * * * *

65 Q. Mr. Mather, you are presently a member of the union? A. Yes, sir.

66 Q. What union is that? A. I belong to Local Union 908, Greenville, South Carolina.

Q. I didn't get the last part. A. Local Union 908, Greenville, South Carolina.

Q. What is the national union; what is the trade? A. Electricians.

Q. On the University Hills Project, Colonial Electric Company had the whole electrical subcontract? A. That is right.

Q. It was not the principal contractor? A. No.

Q. Jonathan Woodner was the principal contractor? A. Yes, sir.

Q. Do you remember how long before this accident occurred you first went out on the job? A. I believe it was in October. I am not positive.

Q. But at least it was in the autumn of 1949? A. That was when I went there permanent, to stay.

Q. You stayed on the job from October, 1949 until the time when you were injured? A. That is right.

Q. You didn't work anywhere else? Yes. A day
67 or so I would be gone but I would always come back to that job.

Q. That was your main job? A. Yes, sir.

Q. Did you do any work for Colonial Electric Company other than the work on University Hills from October, 1949 until February, 1950? A. Yes.

Q. Where did you work? A. I was still with Colonial but I remodeled Mr. White's house. He was a carpenter that knew Mr. McKenney and he had the work done by McKenney.

Q. Was that the only other job? A. I don't know whether the Royal Motors job was in there or not; I don't remember

that. It never was over a day or so I would be gone off that job.

Q. Where was Mr. White's house? A. I don't exactly know the address. It is just off 18th and Rhode Island Avenue; a half mile from there.

Q. Half mile from where? A. 18th and Rhode Island Avenue.

Q. Is it in the District of Columbia? A. Yes.

Q. And the major part of your work—that is,
68 nearly all of your work—was on the University Hills project from in the autumn of 1949 until the time you were hurt? A. Yes.

Q. And you used to work there five days a week? A. Six days.

Q. Six full or five and one-half days? A. Six full.

Q. Were you a member of a union then? A. No.

Q. What work did Colonial Electric have to perform out there? A. They wired apartments; put the fixtures; the switches and plugs.

Q. And did they put up all the temporary wiring? A. Yes.

Q. That is all the temporary power running from one apartment unit to another? A. Temporary line, yes.

Q. And the power company brings the power to the project to one point? A. That is right.

Q. And then Colonial Electric carries it all around the project on wires which are erected by Colonial Electric Company? A. Yes.
69

Q. And that involved the affixing of wires to a number of poles? A. That is right.

Q. And running the wires from the poles to the several buildings? A. Yes, sir.

Q. And that was part of Colonial Electric Company's job, wasn't it? A. Yes.

Q. That was what Colonial Electric Company was being paid for? A. Yes, sir.

Q. Mr. Mather, how many people did the Colonial Electric employ out there at any one time? A. It was various number of employees during the whole job. The most that was on the job at one time was around ten or twelve at the most.

Q. Was the job nearly completed so far as electrical work was concerned when your accident occurred? A. Yes.

Q. The putting in of fixtures is a pretty last thing for electrical contractors, isn't it? A. That is right.

70 Q. Had any of the other temporary wires been removed? A. A part of it had been removed. They had a saw shed there at one time, a saw mill, but the saw mill caught on fire and burnt the pole and it was taken down.

Q. Is that the only other pole that was taken down before this one was to be taken down? A. To my knowledge, that is all.

Q. On other jobs you had removed wires, as I understand it, from poles? A. Beg your pardon?

Q. On other jobs that you had performed before this one you had removed wires from poles? A. Yes.

Q. And in your previous experience as a lineman you had had to climb poles? A. That is right.

Q. In order to put the wires up? A. That is right.

Q. Are you able to say that in your previous experience as a lineman for the Inland Construction Company you never took the wires down? A. Never did.

71 Q. You never got them up wrong and had to take them down again? A. No.

Q. Always put them up right the first time? A. That is right.

Q. But you did have to climb poles. tall poles? A. Right.

Q. In order to put wires up? A. Right.

Q. What kind of a company was Inland Construction Company? A. Inland Construction did all types of work. They were builders also. They were outside electricians; inside electricians; the kind of work I do now. They had linemen; all type of road work.

Q. How did you come to be a lineman? A. At the time that I started to be a lineman in 1939, I was unemployed. I didn't have no work at all. I was approached by a foreman from Inland Construction Company that was in my home town at the time. He asked me if I wanted a job and I took it.

Q. Were you an electrician before you were a lineman?
A. No.

Q. Isn't electrician a higher trade; a more skilled
72 trade than a lineman? A. Very much so.

Q. In other words, you in effect graduated from a lineman to electrician? A. That is right.

Q. How long did you work for Inland Construction Company as a lineman? A. When I first went to work for them I wasn't a lineman. I learned as I went along, with Inland Construction Company. I worked for them for approximately 18 months.

Q. You worked with other linemen? A. Yes.

Q. And with them climbed poles with the other men?
A. Yes. They were learning me the trade.

Q. And you watched them climb poles? A. Yes.

Q. And how they did? A. Yes.

Q. And what they did? A. Yes.

Q. But so far as cutting wires on poles when the wires were already up there, all of your experience occurred after you left Inland Construction Company? A. I don't know what you mean, Mr. Jackson.

Q. As I understand your testimony, you did not,
73 all the time that you worked for Inland Construction Company, remove any wires from poles? A. No.

Q. All the experience you had removing wires from poles occurred after you left Inland Construction Company? A. That is right.

Q. And you removed or had occasion to cut wires on telephone poles on many occasions, didn't you? A. Yes.

Q. And that all occurred after you left Inland Construction Company? A. That is right.

Q. After you left Inland Construction Company, where did these many occasions that you cut wires on poles take place? A. I worked two years for Brisker Electrical Company. I worked for them two years before I went to Colonial Electric.

Q. What kind of work did you do for Brisker Electric Company? A. Same type of electrician as I was for Colonial; inside electrician.

Q. How did you learn to be an electrician? A. I went on the GI Bill of Rights after I got out of the
74 army in 1947. I went to Brisker Electric Company as an apprentice. I learned the trade under the GI Bill.

Q. For the Brisker Electrical Company you had many occasions to go up poles and cut wires? A. It wouldn't be very often.

Q. You said a minute ago many occasions, didn't you? A. Every job that they have temporary lines, if I start help that job I help put the wire in.

Q. Are you quite sure you never cut any wires for the Inland Construction Company? A. Not from poles.

Q. Do you remember when you testified in my office on January 12, 1952:—at the top of page 13:

“Q. Have you had occasion to cut wires on telephone poles before? “A. I was a lineman for 18 months before I ever came in this part of the country.

“Q. Were you a lineman? “A. In Iowa, Nebraska, and Missouri.

“Q. Can you tell us the names of the companies for which you worked? “A. Yes. Inland Construction Company.

“Q. Where is that company's office? “A. Omaha, Nebraska.

75 “Q. Any others? “A. That is all.

“Q. That was the company for which you worked as a lineman? “A. Yes.

“Q. And you had occasion to cut wires on telephone poles on many occasions? “A. Yes.

“Q. After you were employed by Colonial Electric Company, did you have occasion to cut wires on telephone poles? What do they call them—telephone poles—poles? “A. We just call them temporary poles. It is temporary service, anyway. I have taken a lot of them out.”

Did you mean then when you answered that, to let me understand that your experience in cutting wires was for the Inland Construction Company or for somebody else? A. I don't ever remember saying that, but you have got it down there.

Q. You don't remember that? A. No.

Q. It was a mistake? A. I didn't cut no wire for Inland.

76 Q. You didn't cut wires for Inland Construction Company? A. No.

Q. And you have cut wires, however, for Brisker and for Colonial? A. Yes, sir.

Q. And you considered yourself competent to go up a pole and take the wires off the pole? A. Yes.

Q. And that was part of the job of the Colonial Electric Company? A. It was primary job, yes.

Q. It was the primary job? A. Sure. I mean, that wasn't his business all the time, to do that.

Q. But that was one of the things he was to do on this job? A. Yes.

Q. And one of the things that Colonial Electric did when it takes a contract for the electrical work, when it takes a project like the University Hills? A. (No response.)

Q. And as I understood you to say, you put the
77 wires up on this pole? A. I did.

Q. When you joined the union did they give you some material to read with respect to safety practices? A. No.

Q. Did not? A. No.

Q. When you were with any of the other companies that you worked for and for which you did work as a lineman, did you ever have occasion to read any safety rules issued

by anybody? A. No. The only safety rules we had was the foreman that examined our equipment, the only thing that I ever come in contact with.

Q. The foreman of the electric company? A. No; I was talking about Inland.

Q. To examine the equipment? A. Yes.

Q. You are talking about the equipment you wear and tools? A. Yes.

Q. It was the job of the lineman to examine the pole? A. Yes.

Q. And it was the job of the lineman to know when he was safe in removing a wire or wires from a pole?

78 A. That is right.

Mr. Melrod: I object. That is so speculative. It would depend upon every circumstance. He can't answer general questions to that.

The Court: He has answered the question.

By Mr. Jackson:

Q. As I understand it, it is perfectly clear you mounted this pole without putting any braces or guys on it? A. We didn't put any on it.

Q. It is perfectly clear, as I understand it, this was strictly a temporary pole? A. That is right; but it should be treated the same as a permanent.

Q. So far as climbing it is concerned? A. Setting.

Q. So far as setting it in the ground and so far as climbing the pole? A. That is right.

Q. In other words, climbing a pole is a dangerous activity and has to be approached cautiously? A. I wouldn't say it was any more dangerous than any other trade.

Q. Nevertheless, you are going up in the air and if you fall you are going to get hurt; you know that?

79 A. Yes.

Q. How many wires were affixed to this pole, this particular pole? A. Eight.

Q. There is a drawing that Mr. Melrod has placed on the board. Does that substantially show the general direction from the pole of the wires that were affixed there? A. That is right.

Q. Do you know what this little square is? A. That is a switch.

Q. This is the point to which the power company brought the power, isn't it? A. That is right.

Q. That is all the power company will do? A. There is a meter and switch right there. (Indicating).

Q. That is all they are supposed to do, and that is all they do—they bring the power to this point and Colonial Electric was to take it everywhere else on the job? A. That is right.

Q. Is that a shed? (Indicating). A. No. That is where the switch is. There was a pole there.

Q. There is another pole right here? A. Yes, sir.

80 Q. I am referring to the left-hand side of this diagram. The top of the diagram is another spot. A. That is the office; Jonathan Woodner's office.

Q. What is this on the top right? A. That is the apartment building.

Q. And at the lower left? A. That is another apartment building.

Q. From this pole there were two sets of wires that went to the source of the supply? A. Two wires.

Q. What approximately was the distance from the pole to this pole or source of supply? A. I would say approximately forty yards.

Q. So it would have been about 120 feet? A. That is right.

Q. There were two strands or two wires? A. Yes.

Q. Why two wires? A. It was a 110 volt system. It could be used for 220. We used a 110 volt system. One carried the current and the other returned it.

Q. One current went through the system and the other brought it back? A. That is right.

81 Q. That is the reason there were two wires all along? A. Yes.

Q. This is No. 12 synthetic insulation? A. Yes.

Q. How big around is that wire? A. I can look it up but I don't know exactly.

Q. Is it as big around as my little finger? A. No. I can tell you the weight of it. That might give you the general idea.

Q. What is the weight? A. A thousand feet of it weighs 19 pounds and 77/100ths.

Q. 19 and what? A. 77/100ths. That is bare wire. That had insulation on it. It would probably weigh about 25 pounds a thousand with insulation.

Q. What was the distance from the pole to this Woodner office? A. That was about 150 yards up there.

Q. Some 450 feet? A. There were more poles between that pole and the office.

Q. To which these wires were affixed? A. Yes.

82 Q. To the next pole, how many feet? A. About forty yards.

Q. Do you know the width of this street; do you remember, approximately? A. No. It was two-way traffic. I wouldn't know exactly. Around 20 or 25 feet, I imagine.

Q. It was more than that, wasn't it? Is that your estimate; is that the basis of your estimate, that this was 20 or 25 feet, this street? A. The street in width?

Q. Yes. A. A concrete slab is a little over eight feet and it would be twice that. It couldn't be over 25 feet.

Q. The width from curb to curb wouldn't be over 25 feet? A. No.

Q. How far, then, would you say the wires were from this pole to the first building? A. Between 40 and 50 yards.

Q. The same distance for the other one in the lower right of this picture? A. Those two apartment buildings were in line.

Q. They were about equal distance from the pole? A. Yes.

83 Q. So that the two angles are the same? A. Yes.

Q. When you climbed that pole—will you step down to the board and show the jury, if you can, which set of wires you cut first and which wires you cut second, and so on? A. These two first and then these two. (Indicating.)

Q. So that these were left standing? (Indicating.) A. Yes.

Q. As a matter of fact, that obviously altered the strain on that pole, didn't it? A. Just the weight of the wire.

Q. And removed the supports on the side on which you— A. The wire wouldn't have anything to do with holding the pole up. It shouldn't.

Q. It did, obviously. Why that pole was being held up there, in view of it, was by the wires? A. That is right.

Q. And when you cut the wires on one side of the pole you altered the strain and altered the support? A. That is right.

Mr. Melrod: Your Honor, that is a conclusion. I object to that.

By Mr. Jackson:

84 Q. Having been on this job from the fall of 1949 until February of 1950, you were aware of grading which was being carried out on the whole project, weren't you? A. Yes. I knew they were grading on the job; yes.

Q. What evidence did you see of grading? A. When they built the road through; I knew they built that road through there.

Q. You knew that the bulldozers were working in that area? A. I knew they were building that road through there; yes.

Q. You had seen the bulldozers, hadn't you? A. Yes. I knew they were on the job; sure.

Q. When you say you knew they were on the job, what do you mean? Did you see them pushing dirt around? A. Yes.

Q. You saw them working in the vicinity of this pole? A. The road went right by the pole, yes.

Q. Did you see the bulldozers in the vicinity of the pole? A. Yes.

Q. You saw them and you heard the motors running, didn't you? A. Sure.

85 Q. I show you a picture. Do you recognize this picture as a picture of the University Hills Project? Do you recognize that as a picture of the project?

* * * * *

Q. You recognize it as a picture of the project? A. Yes.

Q. I am going to point out a pole. You see the very small black line here. (Indicating). I will ask you if that isn't the pole we are talking about. A. That is right there. (Indicating.)

Q. Which pole? A. Right there. (Indicating.)

Q. Can you make a mark—do you want to come look at this? It is is very faint.

86 Mr. Melrod: Do you want to have that identified? I don't think you have it identified.

Mr. Jackson: Let him put a mark on it; just put a dot on it.

I am going to ask the clerk to mark this Defendant's Exhibit No. 1 for identification.

(The picture referred to was marked Defendant's Exhibit No. 1 for identification.)

By Mr. Jackson:

Q. Mr. Mather, will you hold this picture in your hand a minute? The project was very much advanced between the time that picture depicts and the time when your accident occurred? A. Yes.

Q. It had gotten much farther than that stage? A. Yes.

Q. Do you see evidence in that picture of grading all over the project? A. I believe at the time this picture was taken, most of the grading was being done down on this side of the project.

Q. All that white ground, however, does indicate
87 grading to you, doesn't it? A. I think before this
job started there was timber in there.

Q. So that as a matter of fact, all that white area is
where the land had been cleared and graded; isn't that
true? A. The only part that—the foundation was dug but
I don't remember how they were dug. That was the only
interruption from their original plot of land.

Q. Will you take a look at the area where you put a dot
indicating where the pole was and tell me whether or not
that indicates to you that grading had been already under-
taken in that immediate area? A. The grading didn't have
anything to do with all this land.

Q. I couldn't hear you. A. I mean all this shows white
wasn't graded.

Q. All that shows white wasn't grading. I asked you
whether or not that picture shows to you that there was
grading at that time in the vicinity of the pole in question.
A. This road wasn't cut through there at that time.

Q. So the grading of the road took place between the time
of the taking of that picture and the time you had your
accident? A. That is right. The grading on the road
started just before they put the asphalt tile on there.

88 They got the road prepared for the asphalt roadway.

Q. Now, Mr. Mather, at the time you went out
to climb this pole there wasn't any doubt in your mind, was
there, that the bulldozer had been working in the immediate
vicinity of that pole? It was perfectly visible, wasn't it?

Mr. Melrod: What was visible?

By Mr. Jackson:

Q. The evidence of grading. A. On a construction job
they are grading it all the time. You don't notice it all
the time. I mean, you notice it but you don't pay any atten-
tion to it, where it is, or nothing; after you work around it
three or four years.

* * * * *

89 Q. When you went out to climb this pole was it apparent to you or was it not apparent to you that the bulldozers had been working—not in the road, but in other parts of the area in the immediate vicinity of that pole? Can you answer that directly? A. I don't know whether the bulldozer did anything to the landscape before they put the sod on or not.

Q. Was there sod on the terrace in front of the building? A. Yes. I had been working on down toward the end of the job there.

Q. And there was sod over here? A. Yes.

Q. Did it go all the way to the poles? A. No. They were working on it right there that morning, getting ready to put the curb in. There were laborers on the two-lane drive down from the pole. That is what they were doing, sodding that morning.

Q. It was apparent, wasn't it, to you, that the roadway had been graded, including the part on this side of the curb down to approximately the road level; that is, with the exception of the height of the curb?

Mr. Melrod: Which side of the curb? That question is not clear. You pointed.

90 Mr. Jackson: The road had been graded?

The Witness: The road had already been finished.

By Mr. Jackson:

Q. There was asphalt on it? A. Yes.

Q. They were getting ready to put in a curb? A. At one spot. The curb was all the way down—not clear to the pole. That is the reason they wanted to get the pole out.

Q. Will you come down here and show the point to which the curb had gone? A. The curb had approximately come to here. (Indicating.) That is the reason they wanted this out of the way, to get the curb in.

Q. So the curb was actually up within a few feet of the curb? A. Yes.

Q. And the rest of the area that was past the pole, including the area around the pole, was down to the same grade where the curb was? A. They had skipped this and come on down.

Q. Let's get this straight. You mean they hadn't graded around the pole? A. They couldn't. The pole was in the way.

91 Q. Was there any raised area around the pole?

A. The way it looked to me it was the same as the first time I was ever on it.

Q. It looked to you the same as when you were first on the pole? A. That is right.

Q. Was there a raised area around the pole? A. There was a slope, I would say, but no raise. I mean, it didn't come to an abrupt raise.

Q. So you do not remember seeing the pole with this kind—if there were the part underground, whatever there might have been under there, you don't remember seeing a raised area around the pole? A. It was more of a slope than that. There was a road that came this way from the pole. (Indicating.)

Q. I am looking at the pole sideways and let's say we are looking at the pole down this way. (Indicating.) A. Coming down the two-lane drive?

Q. Yes; looking down the two-lane drive, was there not a raised area, a mound, around the pole? A. I guess you could call it a mound. It was more slope to it than the picture indicates.

Q. Will you come down and show us how the slope was? A. The two-lane drive came this way (indicating) and—

Q. Can you draw a cross-section view of the pole?
92 That is what mine is supposed to be. A. It was more like this. (Indicating.)

Q. How high was that; how high did that slope up? A. I don't remember how much.

Q. You didn't even notice that, did you?

Mr. Melrod: He answered.

Mr. Jackson: He didn't remember and he didn't notice it.

The Witness: I didn't know how many feet it was; I didn't know that, no.

By Mr. Jackson:

Q. Do you have any conscious recollection of looking to see whether or not there was a mound there? A. I knew there was a slope there, yes.

Q. Do you have a conscious recollection of looking to see whether or not there was any indication on the pole that there had been earth removed around the pole? A. No.

Q. Is that your answer—"no"? A. That is right.

Q. You don't have any recollection? A. No.

Q. When you went out to climb the pole, did you
93 take any rope with you? A. No.

Q. You didn't take any crew with you except having Mr. Pierce go over and turn the electricity off? A. We just had a three-man crew—Mr. Pierce, Mr. Chason and myself.

Q. Colonial Electric didn't provide you with a crew? A. The job was almost finished. Three men could easily take care of it.

Q. Mr. Chason didn't even go out with you, did he? A. He was putting fuses in the switch, in the apartment building, the lower one.

Q. He went off some other job? A. Yes.

Q. And he didn't go out with you and he didn't look out for you while you were going up that pole, did he? A. He wasn't there.

Q. This project was in Prince Georges, Maryland? A. Yes.

Q. And where did you live at the time of the accident? A. I lived at 1506 Quarles Street Northeast.

Q. Did your family live there too? A. Yes.

Q. You weren't living at 1116 S Street Northeast?
A. No.

94 Q. Who lives at 1116 S Street Northeast with you now? A. My father-in-law and my wife and son.

Q. Were you living with your wife at the time of the accident? A. Right.

* * * * *

109 Redirect Examination

By Mr. Melrod:

Q. Mr. Mather, Mr. Jackson asked you about the cutting of the wires and the pole coming down. I would like to ask you: From your experience, a pole which was embedded in the ground only 8 inches into the earth: would that pole, in your experience, have come down regardless of how the wires were cut?

Mr. Jackson: Do I understand that my friend is qualifying again as an expert?

Mr. Melrod: No; I am not asking him as an expert.

The Court: He is going back over your cross-examination, I suppose.

Mr. Melrod: It is just redirect. He has gone into that.

The Court: Very well.

Mr. Jackson: Very well.

By Mr. Melrod:

Q. You can answer. A. You mean—

Q. If the pole was set the proper distance, which you say is four and one-half to five feet, would the cutting of the wires have anything to do with the pole coming
110 down? A. Because when I went up there, there was no wires on it.

Q. You mean when you originally went up? A. That is right.

Q. As a matter of fact, Mr. Mather, as a practical matter, regardless of how you cut these wires, whether you cut this wire first or this wire, then this wire and this wire, regardless of how you cut them, in any event there would be some stress in the direction of the wire still standing?
A. I would have went the other way.

Q. So the fact that you cut these two wires first and left these two wires, it didn't make any difference in so far as the pole coming down, did it? A. No.

Mr. Melrod: You may inquire.

Recross Examination

By Mr. Jackson:

Q. You changed your mind—

Mr. Melrod: I object. He didn't change his mind. He testified to what the facts are. I think that is unfair, to say that he changed his mind. He didn't say anything different.

Mr. Jackson: I think the jury heard. I have no further questions.

111 Mr. Melrod: I call Mr. Chason.

Thereupon—**Angus Curry Chason** was called as a witness for and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Melrod:

Q. Will you state your full name? A. August Curry Chason.

Q. Where do you live? A. Parkland, Maryland.

Q. What kind of work do you do? A. Electrician.

Q. How long have you been an electrician? A. 23 years.

Q. Back on February 20, 1950, where were you working?
A. University Hills, out in Maryland.

Q. Who were you working for? A. Colonial Electric Company.

Q. You know Mr. Ernest Mather? A. I do.

Q. We are inquiring about an accident that happened on February 20, 1950. Was Mr. Mather working with
112 you on the job at that time? A. That is right.

Q. What was your capacity on the job? A. Foreman.

Q. What was Mr. Mather? A. He was an electrician.

Q. Do you recall on that morning whether or not you were requested to do anything about any employee of the Jonathan Woodner Corporation? A. I do.

Q. Tell the jury what happened that morning, please, in your own words. A. The carpenter-foreman came in our store room in the basement. He came in just a few minutes before work time and asked me if we could take some wires off some poles. I told him yes.

Q. Can you tell the jury and Court if you know what the name of that carpenter foreman was. A. His name was Sidney Propst, I think his last name is.

Q. Was he working for the Jonathan Woodner Company? A. That is right.

Q. As a result of the request of Mr. Propst to cut the wires down what did you do about it? A. There
113 were several other things that had to be did first.

So I went to do those while the other two boys went out to the pole.

Q. Did you instruct Mr. Mather and the other boy to go to a post to take care of the wire? A. Not specifically. We were all standing there and Mr. Mather and the other fellow were the only two you could use as climbers.

Q. Who was the other man? A. Mr. Pierce; P. E. Pierce.

Q. Did you actually see Mr. Mather go up to cut the wires? A. No.

Q. Do you know where the post was located? A. The pole. On the job I did. I don't know the name of the streets.

Q. You have a general idea where the pole was? A. Yes, sir.

Q. Do you know for what purpose the pole was put there? A. Temporary lights; during the construction of the job.

Q. Do you know what attachments there were to the pole? A. Yes.

114 Q. Tell the jury what those were. A. There was four lines of wire leading off from the pole.

Q. Do you know in what direction they went? A. Approximately at 90-degree angles each way from the pole.

Q. Tell us the next thing that you knew about this accident. A. The next thing I knew, we all three left out together. I went in the building to do some work there in addition to this. The next thing I knew I started out the building and met a laborer coming in and said, "Your man fell off the pole." He said the pole fell with him. He was carried to the hospital.

Q. Do you know who installed those poles? A. I understand that the Jonathan Woodner Corporation did.

Mr. Jackson: Not what you understood.

The Witness: I wasn't on the job when they were installed.

By Mr. Melrod:

Q. You don't know that of your own knowledge? A. I don't know that.

Q. Do you know whether or not at the time the
115 poles were installed, any wires or supports were attached to them? A. No, I don't.

Q. There were none attached to them on February 20, 1950, were there? A. Nothing except the wires that he cut loose.

Q. When you went to the scene of the accident, what did you see? A. Saw the pole laying approximately between the street and the sidewalk and Mr. Mather getting up or trying to get up.

Q. What did you do? A. We got him up and carried him over through another basement and through that out in my car and to the hospital.

Q. Did he seem in pain? A. He was really in pain.

Q. Did you carry him to the hospital? A. That is right.

Q. What did you do then? A. I went back to the job.

Q. When you went back to the job did you take a look at the pole? A. Taken a look at that good.

Q. Can you tell the jury from what you saw that after—let's fix the time. How soon after Mr. Mather fell

116 did you go back and look at the pole? A. About an hour; not much off either way.

Q. Can you fix the time of the day for the jury? A. He fell directly after work time, which was 7:30. About 9 o'clock the best I remember.

Q. When you went back and looked at the pole, could you tell by looking at the pole, Mr. Chason, how deep that pole had been embedded in the ground? A. The morning the pole fell, you could tell easily it wasn't in the ground more than eight inches.

Q. And you could see that yourself? A. You could see that. Mud was still on the bottom of the post up to about 8 inches.

Q. Did you do anything about the pole? Did you do anything with it? A. No.

Q. You just went about the work? A. That is right.

Q. In your experience, do you know how deep a pole should be embedded in the ground, of that height? A. Of that height it should be about six foot.

Q. Do you know how tall this pole was? A. That pole measured 28 foot six inches.

117 Q. Did you measure it? A. I helped measure it.

Q. You know that it should be embedded that deep? A. That particular pole shouldn't be under four foot at any time.

Q. What was the condition of the earth at that point? Was it normal or ordinary? A. They had been grading around here and there. You couldn't tell much about that. The ground was partly frozen that morning.

Q. It was frozen; partly frozen. You say they had been doing a lot of grading? A. Off and on during the job they had been grading up and down the street.

Q. And the Jonathan Woodner people were doing that? A. They were doing the grading around the building. As to where they did the grading out in the street I don't know. They might have contracted that.

Mr. Melrod: You may inquire.

Cross examination:

By Mr. Jackson:

Q. Mr. Cason, are you a lineman? A. No, sir.

Q. Have you ever been a lineman? A. No, sir.

Q. What do you know about how deep a pole should
118 be? A. We have a code we go by and of course,
after 23 years you are bound to see the different
things like that.

Q. What code do you go by? A. In that case out there
we go by the National Electrical Code.

Q. Are you referring to the National Electrical Code
issued by the Bureau of Standards? A. It is issued, I
think, by the National Bureau of Fire Underwriters. That
is a supplement to it, I think.

Q. I show you a document, U. S. Department of Com-
merce document, National Bureau of Standards Safety
Rules for the Operation of Electrical Equipment and Lines.
Is that the code, or one like it? A. It is the National
Electric Code we go by. I am sure they are about the same.

Q. You do have an electrical code? A. That is right.

Q. And electricians are acquainted with those codes?
A. That is right.

Q. Including Mr. Mather? A. Supposed to be.

Q. As an electrician he is supposed to be familiar with
that? A. Sure.

119 Q. Let's see which code you are referring to. Is
this one, the one I hold? A. No, it is not that one
you have there.

Q. It is a code issued by whom? A. It is issued, if I am
not mistaken by the National Fire Underwriters.

Q. Do you have a copy of it? A. I have a copy but not
with me.

Q. You have a copy at your office? A. At my home.

Q. Does it contain some material with respect to the
depth the hole should be in the ground? A. It will give you
the depth of the pole for the height of the pole.

Q. And it is those figures which you are quoting us here, what you got from that code? A. I have not looked that up. It has been years since I looked at that. That is the ordinary depth of the pole.

Q. What you told us here is your recollection of what you did read? A. That is right.

Q. Other than that which is contained in that code, 120 you don't personally know? A. No.

Q. Are you pretty sure you have a copy of that code? A. I know I have a copy of the code.

Q. So if I requested to bring it to the courtroom you could produce it? A. That is right.

Q. Do you know whether or not that code also contains material with respect to how a lineman should take wires off poles? A. That I don't know. I have not read that part. It could be in it and it possibly couldn't be in it.

Q. On the morning when Mr. Propst came over and asked you to remove the pole, did you go—

Mr. Melrod: He didn't say "remove the pole". He said "Remove the wires". There is a big difference.

Mr. Jackson: You are right.

By Mr. Jackson:

Q. When Mr. Propst came over and asked you to remove the wires that was the proper thing to do, to tell the electrical contractor, wasn't it? A. I being the foreman and the contractor not on the job, he told me.

Q. He told you. He didn't tell anybody else? A. He asked me would I have the wires removed.

121 Q. And you directed Mather and Pierce to undertake the job? A. You could call it that. I merely said, "Let's get it done."

Q. And you went off to some other part of the job? A. I had to disconnect some more wires, not off that pole, but in the building that they were feeding before they could be cut.

Q. Did you designate which man should climb the pole? A. No, sir.

Q. Mather was capable of climbing the pole? A. I understood that he was.

Q. That means that he was a lineman in addition to being an electrician? A. Not necessarily.

Q. What does it mean? A. You don't have to be a lineman to climb one pole.

Q. He had climbed other poles, hadn't he? A. Not to my knowledge.

Q. Was it within his duty or not within his duty to climb that pole and remove the wires? A. That is the only way you could remove the wires.

Q. When you sent him out to remove the wires, you knew he or Pierce were going to climb that pole?

122 A. One of the two would have to go up it.

Q. Was Pierce a lineman? A. I think at one time he was. We didn't have any linemen on this job.

Q. Don't you know, as a matter of fact, that Mr. Mather was a lineman at one time? A. I don't.

Q. Why did you say in your answer to Mr. Melrod that Pierce and Mathers were the only two men that could climb the pole? A. I am going about what they say; not what I know. I never saw one of them climb a pole before; not with hooks on.

Q. So when you sent them out there you didn't know whether he was competent to climb a pole or not? A. They wanted to do it.

Q. How long after he fell did you arrive at the scene, if you know? A. I would say three to four minutes. I was starting out when the man met me.

Q. Incidentally, do you know how to climb a pole? A. No, sir; not with the hooks.

Q. And you don't know how a man ought to go about climbing a pole? A. No, sir.

Q. And you don't know whether or not Mather and
123 Pierce knew how to climb a pole? A. I knew that they had both said they had climbed poles before.

Q. And represented to you that they were competent to do that?

Mr. Melrod: He is putting words in his mouth. He didn't say that. He said they represented that they had climbed poles before; that is all he said.

By Mr. Jackson:

Q. Did that indicate to you that they were competent?

A. If I tell you I climbed a pole before, you don't know whether I have or not unless you saw me do it.

Q. You had never seen him climb a pole? A. Never.

Q. You were the foreman on this job? A. That is right.

Q. When you got to the scene of the accident, the pole was on the ground? A. Laying on the ground.

Q. And you say it was only six or eight inches into the ground? A. From the appearance of the mud on it, on the butt of the pole as it was turned over.

Q. There was more mud on the pole than just the
124 very tip end? A. Not all the way around. Sure, there was mud on the pole where it hit the ground.

Q. It was dried and caked mud above that? A. It was in February and that morning it was partly frozen.

Q. What about the rest of the pole? I want to know just what you saw, Mr. Chason. That is all I want to know. Let's assume for our own purposes here that this represents a pole 28 feet 6 inches long (indicating); that is the total length. A. That is the total length.

Q. As I understand it, you say that there was fresh soil still clinging to the bottom of the pole to the extent of the depth of six inches or eight inches? A. That is right.

Q. Did you observe whether there was some soil above that dried and caked— A. Not until after I carried him to the hospital.

Q. Then you did see it? A. Then we went back and looked the pole over good.

Q. You looked it over good? A. Yes.

125 Q. You saw it? A. You could see it. You had to look it over good, though.

Q. Are you sure about that? A. Sure.

Mr. Melrod: He said you could see it if you looked at it real closely. Don't put words in his mouth that he didn't say. He didn't say that. He said you could see it if you looked at it real good.

The Court: Just a minute. Put your question, Mr. Jackson.

By Mr. Jackson:

Q. Are you sure that if you looked at it real good, you could see dried and caked mud above the fresh soil— A. I wouldn't call it dried and caked mud.

Q. What would you call it? A. If a pole has been in the ground four foot and it has been graded away from for months you can still see plainly, but not too plain; you won't see mud but you will see a difference in the color of the wood itself.

Q. But you could see it? A. When the pole fell over. You would have to look real close.

Q. You would have to examine it close; you would
126 have to examine it carefully? A. To find it.

Q. You didn't tell these men when they went out there to undertake to brace that pole, did you? A. No.

Q. You were aware that there had been grading in the area? A. When the man came down to tell me to have the wires removed off the pole he didn't even state what particular pole.

Q. He didn't. How did you know? A. How did I know what?

Q. What pole? A. They went on out to take it off.

Q. How did you know what pole to tell them to take the wires off? A. It was more than one pole on the job.

Q. How did you know what pole to take the wires off? A. I didn't have to tell them exactly what pole. They knew where the wires were and where to take them down.

Q. You mean to tell me that Mr. Propst, when he came, didn't tell you which pole he wanted the wires taken off?

A. He said have the boys go out and cut the wires off that pole.

127 Q. And you didn't know which pole? A. I didn't go out to see which pole. The two boys went with him.

The Court: Went with whom?

The Witness: Carpenter foreman, Propst.

By Mr. Jackson:

Q. You did not warn them to take any precautions about bracing or guying the pole? A. No, sir.

Q. Did not? A. No, sir.

Q. Did you ever look in the safety code to see whether or not there was anything about that? A. No.

Q. You only looked to see the depth of the pole; that is the only thing you can remember about the safety code? A. After that.

* * * * *

129 Redirect Examination

By Mr. Melrod:

Q. Mr Chason, you told us that when you went out there you went to cut off some other wires. Do you recall your testimony to Mr. Jackson? A. Yes, sir.

Q. What was the purpose of your going into the building to cut off some other wires? A. We had a line run from the top of this pole into a building servicing some temporary lights. In this same building there was still another service, a permanent service. I went to cut the ones coming from that pole and re-hook it.

Q. In other words, Pierce and Mather went to the pole to do what they had to do around the pole in cutting those wires; is that correct? A. That is right.

Q. And you, in assisting them, went in the building to cut some additional wires that would prevent any current from electrocuting Mr. Mather? A. That wasn't
130 exactly the idea. The work I did in the building wouldn't have hindered their work at the pole at all.

Q. Would it have any effect on their work at the pole? A. No.

Q. In other words, the wires that you were cutting in the building did not affect the cutting of their wires at the pole? A. No.

Q. All right. I didn't understand that.

Mr. Jackson was asking you about the other mud that was caked on the pole, regarding whether you could see any other line on the pole. When you said you had to look at it carefully, will you explain what you mean by that? A. If there had been mud on it at one time, and the rain, the weather for three or four months would take a lot of it off; in fact, most of it; and you would have to look close, be looking for a place on it.

Q. In the ordinary course of events of a person going up that pole for the purpose of cutting that wire, would they observe anything unusual about that pole? A. I don't think they would have.

Mr. Melrod: That is all.

Recross Examination

By Mr. Jackson:

131 Q. Mr. Chason, if mud had been splashed on the pole by the action of rain and weather rather than its being as the result of a grading job, the mud that you saw caked on the pole would be about the same as that which you saw, wouldn't it? A. I don't think it would have got up and made a circle around the pole.

Q. There was a circle? A. You could tell where the mud was stopped. It was near about a circle. It wasn't mud. It was where mud had been.

* * * * *

132 Thereupon—**Tillman Edsel Pierce** was called as a witness for and on behalf of the plaintiff, and having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Melrod:

Q. Will you state your full name? A. Tillman Edsel Pierce.

Q. Where do you live? A. I live at 1270 Meigs Place Northeast, Apartment 1.

Q. How long have you lived in the District of Columbia? A. About 12 years.

Q. What kind of work do you do? A. Right now I am doing electrician work; house wiring.

Q. How long have you been an electrician? A. On house wiring for about—I done line work for about eight years—ever since I was 25 years old I have been fooling around with this kind of stuff.

Q. How old are you now? A. 51.

133 Q. Back in February, 1950, where were you working? A. As well as I remember, it was at University—College Park—over there.

Q. Who were you working for at that time? A. Colonial Electric.

Q. Was Mr. Mather, Ernest Mather, working with you? A. That is right.

Q. Who was your foreman on that job? A. You mean electric foreman?

Q. Yes. A. A fellow by the name of Chason.

Q. We are asking and inquiring about an accident that happened on February 20, 1950, where Mr. Mather got hurt. Were you there? A. Yes, sir.

Q. Tell us, that morning, were you requested to do any work by somebody from Woodner? A. Yes, sir.

Q. Tell us in your own words what happened and what you were requested to do. A. That morning, kinda early—I wouldn't recall as to how early—a fellow by the name of Sid, one of Mr. Woodner's foreman, come down
134 there and asked us to remove the drops from this pole so they could take the pole down and finish their grading job.

So me and Mr. Mather went up there and we had one pair of hooks, and he put them on. I said, "Well, I will kill the line." I went up, and when I got back down he had started up the pole. He went on up the pole.

Q. You are going a little fast. Mr. Mather went over to the pole; is that right? A. That is right.

Q. And where did you go? A. I went up and pulled the switch.

Q. Where was that switch in relation to the pole? A. I would say something like two hundred yards or 150 yards from where the pole was standing.

Q. Say this is the pole. (Indicating). This is a two-lane street. (Indicating). Was the switch in this direction over here? A. Yes.

Q. You walked over there to cut off the power? A. That is right; pull the fuse.

Q. After you cut off the power did you give Mr. Mather the signal? A. I said, "Okay."

135 Q. What did you do? A. I walked back down towards the pole.

Q. You came back towards the pole? A. Right.

Q. What did you see happen? A. Mr. Mather went up the pole; we call him "Ernie"—went up the pole. I stood by watching. He clipped one, he clipped two, he clipped three. When he clipped three, I said, "Watch out." You know what I mean. He was fast with his pliers. He didn't have any felt around him.

When he clipped four, down she come. I tried to catch the pole and press against it and I couldn't do nothing.

Q. Which direction did the pole fall? A. Towards where those wires were leaning.

Q. Towards the street? A. That is right; across the concrete.

Q. Did he come down on the concrete? A. No. He skid down as far as he could. It was so fast he got down part of the way.

Q. He couldn't get all the way? A. No.

Q. Did you notice when he fell, did you look at the pole to see what made it come out of the ground? A. Not at that time, but I did after I carried him on to the hospital.

136 Q. Did you take him to the hospital? A. That is right; me and Mr. Chason.

Q. When you came back, did you take a look at the pole? A. I did.

Q. Tell the jury in your own words what you saw. A. The pole was in the ground; it couldn't be more than eight inches. There was the dirt up on it.

Q. Did you see that yourself? A. I certainly did.

Q. Was that the reason the pole came down? A. Because it wasn't in the ground; absolutely.

Mr. Melrod: You may inquire.

Cross Examination

By Mr. Jackson:

Q. Mr. Pierce, have you been a lineman? A. Yes, sir.

Q. Where? A. Tennessee.

Q. With what company? A. Hydroelectric.

Q. For how long were you a lineman? A. For about fifteen years. Speak a little louder I can't hear you.

Q. In your job as a lineman did you learn about
137 certain safety practices that linemen follow? A. Yes, I did; with the company, yes.

Q. Did they tell you about how to climb a pole? A. Well, yes, sir; I learned to climb; yes, sir.

Q. When you say "learned to climb" you mean that you learned to use the spikes? A. You mean those hooks on climbers?

Q. Yes. A. I certainly did.

Q. In addition to learning to use the spikes, did you also learn the right way to go up poles and the things to do when you go up a pole? A. I never did fall.

Q. And you never did fall? A. No, sir.

Q. So you were accustomed to follow the rules to take care that you didn't fall, weren't you? A. I learned to climb; sure.

Q. When a pole isn't safe, you normally brace it, don't you? A. If we had knowed that pole be in condition we would have cut the drops from the other building and let the pole fall.

Q. That would have been the way to do it? A. If
138 we had knowed it, yes, sir.

Q. If you had discovered that the pole wasn't eight inches in the ground? A. We would have never went up.

Q. You would have never gone up? A. Right.

Q. After Mr. Mather fell, was there anything about the pole that made you know that the pole was at one time deeper in the ground than eight inches? A. No. I didn't pay any attention to the pole. After I came back from the hospital I went back up there and looked at the pole and the pole was clean down, washed down, from dirt other than about six or eight inches.

Q. Wasn't any dirt on the pole? A. The pole was clean, as I say, until I come back, except about six or eight inches of dirt was on the pole. The pole was sitting up there. It couldn't be over eight inches in the ground. I would have climbed the pole myself. He and I were the only two that can climb. If he hadn't been on the job that day I would have climbed myself.

Q. The pole was clean down to the point of six or eight inches? A. That is right. There was no dirt on the pole except six or eight inches.

139 Q. You are pretty sure about that? A. Yes, sir, I am pretty sure about that.

* * * * *

166 By Mr. Jackson:

Q. Is that one of the buildings on the University Hills Project? A. That is right.

Q. When this pole that we have been talking about was erected, that is, before it fell, was it in the vicinity of that building, do you know? A. Kinda down this way a little bit to the left of the building.

Q. That is one of the buildings — A. It is the same building that it was closest to. They are all just alike.

Q. Look at the ground around the building, the soil. Is it substantially in the same condition it was on the day when the accident occurred? A. The pole fell this way. (Indicating). The pole looks like it has been moved to me.

Q. Moved from where? A. From out of the street to where it fell.

* * * * *

A. It was a pole. It looks like it.

168 Mr. Jackson: Mr. Photographer, will you put in the machine Defendant's Exhibit 2D for identification?

By Mr. Jackson:

Q. Now, Mr. Pierce, that is another view. Does that appear to be the same building that was in the other picture?

A. I will tell you those buildings are all just a like.

Q. Does that look like the pole that was involved in this accident? A. Just as I said a moment ago, it looks like the pole; something like that.

Q. Look at the ground around that pole. Do you have any recollection of the condition of the soil area around there on the day of the accident? A. Well, as I said a moment ago, I don't think it was broken up like that. I don't remember if it was.

Q. Do you remember whether or not there was a sewer trench? Could you see the sewer trench? A. I see it.

Q. That is a sewer trench? (Indicating). A. It looks to be.

Q. Do you remember whether that was there? A. I don't think it was.

Q. You don't? A. I don't think it was.

169 Q. Do you know? A. I said I don't remember.

Q. Where I point now; is that the butt end of the pole, the part that was in the ground? A. It looks to be.

Q. Do you know whether it was or not? A. I don't know. I couldn't say that is the same pole.

Q. You wouldn't say that is the same pole? A. No. It looks like it.

Q. It looks like it? A. It looks to be.

Q. Does it look like it is in the same condition as when you saw it after this man fell? A. They moved the pole while we had gone to the hospital.

Q. Does it look to you like the same pole except having moved into the curb where it wouldn't be lying in the street? A. I stated that to be. It looks to be.

Q. All I am getting you to say: There is nothing complicated about the question—does the pole appear to be in the same condition that it was in on the day when Mr.

Mather had this unfortunate accident? A. The pole
170 fell this way (indicating). The pole wasn't lying that way.

Q. I don't mean the location. I am talking about the condition of the pole itself. I don't care where it is. I am talking about the condition of the pole. If you can't answer, if you don't know, just say so. A. I have answered all I know about it.

The Court: What is the answer?

The Witness: That is all I know about it; all I remember about it.

Mr. Jackson: I ask the photographer to show Exhibit No. 2D, please.

By Mr. Jackson:

Q. Does that make it any clearer to you whether that is the pole or not the pole. A. That looks like it did.

Q. Looks like it did on the date of the accident? A. I didn't say that. It looks like the one you showed me a minute ago. They all look alike to me.

Q. You can't say it was in the same condition or not?

A. I wouldn't swear to it.

Q. Take a look at Defendant's Exhibit No. 2A and see if that does anything more to refresh your recollection.

Does that do anything more— A. It looks like the
171 same pole.

Q. Are you able to say any better than you did before whether it was in the same condition that it was when Mr. Mather fell? A. It wasn't lying that way when it fell with him. It fell across the street.

Q. I didn't mean the same position. I mean the condition of the pole. A. It looks like the others would to me.

Q. Do you see this darker area immediately behind the pole, this strip, this horizontal strip running from one end to the other? (Indicating). A. That looks like the sidewalk to me.

Q. Could this be one of the forms for the curbing? A. That looks like it be the form, the sidewalk, to me.

Q. You mean for the edge of the sidewalk? A. That is right.

Q. Where the curbing would be? A. The curbing would be out from it a little.

Q. It is true, is it not, that you can see from this picture that the sidewalk has not yet been poured; is that right? A. It is hard to tell from here.

172 Q. Is that hard to tell for you? A. I wouldn't say it had been poured. It is fixed for it. I wouldn't swear that is concrete.

* * * * *

174 Thereupon—**Angus Curry Chason** resumed the stand, and having been previously sworn, was examined and testified further as follows:

Recross Examination (Continued)

By Mr. Jackson:

Q. Will you show that same picture? Can you see that picture, Mr. Chason, fairly clearly? A. I can see it all right from here.

169 Q. Do you know? A. I said I don't remember.

Q. Where I point now; is that the butt end of the pole, the part that was in the ground? A. It looks to be.

Q. Do you know whether it was or not? A. I don't know. I couldn't say that is the same pole.

Q. You wouldn't say that is the same pole? A. No. It looks like it.

Q. It looks like it? A. It looks to be.

Q. Does it look like it is in the same condition as when you saw it after this man fell? A. They moved the pole while we had gone to the hospital.

Q. Does it look to you like the same pole except having moved into the curb where it wouldn't be lying in the street? A. I stated that to be. It looks to be.

Q. All I am getting you to say: There is nothing complicated about the question—does the pole appear to be in the same condition that it was in on the day when Mr.

170 Mather had this unfortunate accident? A. The pole fell this way (indicating). The pole wasn't lying that way.

Q. I don't mean the location. I am talking about the condition of the pole itself. I don't care where it is. I am talking about the condition of the pole. If you can't answer, if you don't know, just say so. A. I have answered all I know about it.

The Court: What is the answer?

The Witness: That is all I know about it; all I remember about it.

Mr. Jackson: I ask the photographer to show Exhibit No. 2D, please.

By Mr. Jackson:

Q. Does that make it any clearer to you whether that is the pole or not the pole. A. That looks like it did.

Q. Looks like it did on the date of the accident? A. I didn't say that. It looks like the one you showed me a minute ago. They all look alike to me.

Q. You can't say it was in the same condition or not?

A. I wouldn't swear to it.

Q. Take a look at Defendant's Exhibit No. 2A and see if that does anything more to refresh your recollection.

Does that do anything more— A. It looks like the
171 same pole.

Q. Are you able to say any better than you did before whether it was in the same condition that it was when Mr. Mather fell? A. It wasn't lying that way when it fell with him. It fell across the street.

Q. I didn't mean the same position. I mean the condition of the pole. A. It looks like the others would to me.

Q. Do you see this darker area immediately behind the pole, this strip, this horizontal strip running from one end to the other? (Indicating). A. That looks like the sidewalk to me.

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Q. You mean for the edge of the sidewalk? A. That is right.

Q. Where the curbing would be? A. The curbing would be out from it a little.

Q. It is true, is it not, that you can see from this picture that the sidewalk has not yet been poured; is that right? A. It is hard to tell from here.

172 Q. Is that hard to tell for you? A. I wouldn't say it had been poured. It is fixed for it. I wouldn't swear that is concrete.

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174 Thereupon—**Angus Curry Chason** resumed the stand, and having been previously sworn, was examined and testified further as follows:

Recross Examination (Continued)

By Mr. Jackson:

Q. Will you show that same picture? Can you see that picture, Mr. Chason, fairly clearly? A. I can see it all right from here.

Q. Mr. Chason, do you recognize the building in
175 this picture? This is Exhibit No. 2C. A. I do, yes.

Q. What building is that? A. Those buildings
out there went by number. The number of that particular
building I don't remember offhand.

Q. You do remember having seen that particular building? A. That is right. I worked in that building.

Q. That is at the University Hills project? A. That is right.

Q. Do you know whether or not that was one of the buildings or the building closest to the pole from which Mr. Mather had his accident? A. That was the closest building to the pole.

Q. Can you tell us whether or not the building and the grounds around there were in substantially that condition? A. That is just about. It had to be.

Q. Just about the way the ground looked on that day? A. That is right.

Q. Are you able to say that this would be the pole in question (indicating)? A. That appears to be the pole.

Q. Do you remember how long the pole lay in the street? A. No, I don't.

176 Q. Do you have any idea when it was moved into the curb? A. No, I don't. That is not the way it was laying when I looked at it.

Q. It was lying across the street? A. Yes.

Q. It fell across the street? A. Not exactly straight across the street, but more out from the curb that it is there.

Mr. Jackson: Mr. Photographer, will you show No. 2A?

By Mr. Jackson:

Q. Now, Mr. Chason, does that appear to be the pole in this picture, the pole in question? A. That is right.

Q. What is your answer? A. That is right; it appears to be the same pole.

Q. Does it appear to be in substantially the same condition as on the day of the accident? A. That is right.

Q. It does? A. It does.

Q. When the accident occurred, do you remember whether a form had been placed for the pouring of concrete? A.

That I don't remember.

177 Q. Do you recognize what this dark line running horizontally is (indicating)? A. That is a curb, and gutter form, steel form.

Q. Are you able to tell from this picture whether the curb or gutter has yet been poured? A. You can't see it. They usually leave those forms maybe a day or couple of days after it is poured and then they remove it.

Mr. Jackson: Will you let us see Exhibit 2B?

By Mr. Jackson:

Q. Are you able to tell from this picture, Mr. Chason, whether the curb and gutter has yet been poured? A. It is about the same as the other. I can't tell from that whether the concrete is actually in the forms or not.

* * * * *

178 Mr. Jackson: Will you show the witness Exhibit 2D?

By Mr. Jackson:

Q. Does that also appear to be the pole from which Mr. Mather fell (indicating)? A. It does.

Q. That pole was a temporary pole, wasn't it? A. That is right.

Q. It was intended to be taken down before the job was turned over as finished? A. That is right.

* * * * *

180 Q. Mr. Chason, are you able to say that if you had known that this pole was not sufficiently deep in the ground to be safe to climb, that you would have had the wires cut at the far end of the wires rather than at the pole? A. That is right. I certainly would never send a man up the pole knowing that it wasn't safe. So the only

other way would be cutting the wires away from the pole and let the pole fall.

Q. You have seen it done that way? A. I have never actually saw it did that way but that is the only way to do it.

Q. You think it is common sense to use? A. That is right.

* * * * *

184 Thereupon—**Adrian Sidney Propst** was called as a witness for and on behalf of the plaintiff, and having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Melrod:

Q. Would you state your full name? A. Adrian Sidney Propst.

Q. Mr. Propst, where do you live? A. 9812 Bristol Avenue, Silver Spring, Maryland.

Q. Where are you employed? A. At the moment, with T. O. Manfield, builders.

Q. Mr. Propst, what kind of work do you do for the present company? A. I am job superintendent at the time.

Q. What is the nature of the work your employer is doing? A. Building homes, residential houses.

Q. You are the superintendent of that job? A. I am now, yes, sir.

185 Q. Mr. Propst, what has been your experience in the building business? A. About 17 or 18 years.

Q. Back in February of 1950, were you working for the Jonathan Woodner Corporation? A. Yes, I was.

Q. What kind of work were you doing for them? A. I was the general carpenter foreman on the garden-type apartment job.

Q. What are the duties of the carpenter foreman on a project of that kind? A. Well, to expedite the carpenter laborers as well as the other laborers. He usually is the next man to the superintendent.

Q. What was the Jonathan Woodner Corporation building at that project? A. 330 garden type apartments.

Q. Were you the carpenter foreman for the whole job? A. Yes, sir.

Q. How many men did you have under your supervision? A. At the highest point, about 46.

Q. Mr. Probst, we are inquiring about an accident that occurred to Ernest Mather on February 20, 1950. Do you recall when he was injured. A. It was during the 186 month of February. I don't know the date; I don't remember the date.

Q. But you do have an independent recollection of the fact that Mr. Mather was injured on the job? A. Yes, sir.

Q. Did you know who he was working for? A. He was working for a subcontractor known as Colonial Electric Company.

Q. Did there come a time on the morning of February 20, 1950 when you gave instructions to the foreman of the Colonial Electric Company? A. Yes, sir.

Q. Tell the jury what your instructions were. A. I asked Mr. Chason to have an electrician to cut some temporary wiring off a pole so that the pole could be removed.

Q. Why did you want that wiring cut down, Mr. Propst? A. First of all, it was in the line of some curb and gutter that we were about to pour or set forms for pouring and secondly, we didn't need the service any longer.

Q. Now, Mr. Propst, did the Jonathan Woodner Corporation install that pole? A. That is correct.

Q. And why did the Jonathan Woodner Corporation 187 tion install the pole in the first place, if you know?

Mr. Jackson: I object. It is irrelevant.

The Court: You say why?

Mr. Melrod: Yes; why did Jonathan Woodner put the pole in there.

The Court: What was the purpose?

Mr. Melrod: Yes.

The Court: I will overrule the objection. He may answer if he knows.

The Witness: That is the usual procedure.

By Mr. Melrod:

Q. Were there wires connected to it? A. Yes, sir.

Q. Did you have anything to do with the supervision of the installation of this pole? A. No, I did not.

Q. Do you know what employees of the Woodner Corporation installed the pole? A. I don't know them by name but they were classed as laborers under a foreman.

Q. Under a foreman? A. Labor foreman.

Q. Was that foreman employed by the Jonathan
187 Woodner Corporation? A. That is correct.

Now, on the date, that morning, as I understood your testimony, you directed that the wires be removed; is that correct? A. That is right.

Q. Was it your intention to have some other employees of the Jonathan Woodner Corporation remove the pole after the wires were cut? A. That is right.

Q. You did not, did you, instruct the Colonial Electric Company foreman to remove the pole, did you? A. No, sir.

Q. What was the next thing that you found out about this accident after you gave the instructions that morning to remove the pole? A. All the men went about their business in the various departments and I started the regular morning check-up on the job, leaving the construction office and going to other parts of the job.

Q. When did you first learn that Mr. Mather had been injured while attempting to cut the wires? A. Perhaps 30 minutes after I had left the construction office.

Q. And how did you learn of that fact? A. I
189 don't remember by whom but one of the laborers that was working in the area came looking for me.

Q. Did you go to the scene of the accident? A. Yes, I did.

Q. Did you see the pole? A. Yes, I did.

Q. Tell the jury what position the pole was when you saw it. A. The pole was lying with the base of the pole, I would say, in the curb line and the top of the pole slightly out in the street.

Q. Did you examine the pole? A. Nothing other than just looking at it.

Q. You looked at the pole? A. Not very closely but I did look at it.

Q. What did you observe about the butt end of the pole when you looked at it with respect to how far it appeared to have been in the ground?

Mr. Jackson: He can tell what he saw.

Mr. Melrod: Yes.

The Witness: That morning the ground was frozen and there was frozen ground stuck to the pole about, I would say eight inches up on the pole.

By Mr. Melrod:

190 Q. You could observe that mark fresh on the pole?

A. Yes; the frozen ground was there. That is about the only marks.

Q. Were you able to see anything else distinctive about the pole? A. No.

Q. Could you tell any marking on the pole to indicate how deep it had been in the ground before? A. There was no marking on the pole that I could determine how deep it was planted at that time.

Mr. Melrod: Will you put the lights out so I could show Mr. Propst some of these photographs, Mr. Marshal?

By Mr. Melrod:

Q. Will you come down here?

This is Exhibit 2D. Now, Mr. Propst, this is a picture marked 2D and shows what purports to be the pole. Does that look to be the pole that you saw on the morning of the accident (indicating)? A. Yes, it does.

Q. Now, in back of the pole you will notice that there is a black line here (indicating). Can you tell us what

that is? A. That is the back of the gutter panel, concrete gutter panel.

191 Q. That is put in the ground for what purpose?

A. For pouring the back flange of the concrete gutter.

Q. Now, Mr. Propst, I want you tell the jury whether or not this back flange as you just called it, was in the ground as it appears in this picture, at the time that you first came to the scene and you saw the pole lying in the street. A. No, that hadn't been installed.

Q. In other words, Mr. Propst, this was installed after the accident occurred? A. That is right.

Q. And, Mr. Propst, tell the jury—you see various ground in the back here, which is sort of broken up; is that true? A. That is right.

Q. At the time that the pole was erected and when you sent Mr. Mather to go cut the wires, was that ground broken up as it appears in that picture? A. No, it wasn't. That ground represents ground that was thrown out from a two-inch channel for that setting.

Q. So that at the time Mr. Mather went to cut the wires, as a matter of fact the ground for an area of ten to twenty feet around that pole had not been broken up, had it? A. Not right around the base of the pole.

* * * * *

By Mr. Melrod:

192 Q. Mr. Propst, tell the jury, if you will, why you know that the area around the pole was not broken up. A. There had been a area left out around the pole approximately 20 to 30 feet, three sections of forms for letting equipment pass through.

Q. In other words, is it true, then, when you say "letting the equipment pass through"—tell the jury what you mean by that. A. The curbs and gutters on that particular street had been poured from two directions coming into that point.

Q. Was traffic to move through this area? A. That is right; for grading and trucks to get around buildings.

* * * * *

By Mr. Melrod:

193 Q. Mr. Propst, the very thing that you have just explained to the jury regarding the grading in that area and the removal of the pole and that whole general area, —was that subject to your jurisdiction? A. At that particular time, yes.

Mr. Melrod: You may inquire.

Cross Examination

By Mr. Jackson:

Q. Mr. Propst, when you went to the place where you saw the foreman of the Colonial Electric Company and gave him his instructions, did you tell him how he was to remove the wires? A. No, sir, I didn't.

Q. Is that the duty of the electrical contractor? A. Yes, it is.

Q. And did you tell him how the electrician or lineman was to go up the pole? A. No, I didn't.

Q. Was that the duty of the electrician? A. I would say yes.

* * * * *

By Mr. Jackson:

194 Q. Did you make any representations to Mr. Chason—that was the foreman, wasn't it? A. Yes, sir.

Q. —with respect to whether the pole was safe or not? A. No, I didn't.

Mr. Jackson: Mr. Photographer, will you turn this machine on?

By Mr. Jackson:

Q. As a matter of fact, determining whether the pole is safe to climb or not was the duty of the electrician and the lineman, wasn't it?

* * * * *

195 The Witness: Yes, I would say so.

By Mr. Jackson:

Q. Now, Mr. Propst, at the time when this pole was erected or the morning of the accident this area had been and was in the process of grading, was it not? A. Yes.

* * * * *

By Mr. Jackson:

Q. To what extent, Mr. Propst, had grading op-
196 erations been taking place over the whole area that I show with my pointer here, indicating the area from the building on this exhibit to the left-hand edge of the picture? Do you understand my question? A. Yes.

The Court: You may answer.

The Witness: I couldn't say that the grading in that area—

The Court: Did you say you couldn't see or say?

The Witness: I couldn't say the grading in that particular area was either finished or down to sub-grade. It had been a matter of moving dirt from time to time, either putting dirt into the area or moving it out.

By Mr. Jackson:

Q. So that the soil in that area was in generally disturbed condition, was it not? A. That is right. It had been disturbed from time to time over a period of several months.

Q. That was perfectly visible to the eye? A. Yes.

Q. Now, Mr. Propst—

Mr. Jackson: Mr. Photographer, will you identify the picture?

The Photographer: 2D.

By Mr. Jackson:

197 Q. Mr. Propst, on this picture, Defendant's Exhibit 2D for identification, as you sit there in the

witness chair, do you see an area from the butt end or base of the pole to approximately this point where I now hold my pencil (indicating) which is of a somewhat darker color than the rest of the pole? A. Yes. It looks a little like the bark had been knocked off the pole.

Q. It looks like the bark had been knocked off the pole?

A. Yes.

Q. Do you see this area from this point to this point (indicating)? Do you see a slightly different color?

A. Yes.

Q. Would you say that that was a skinned bark area?

A. No. That looks from here like that the bark had blackened.

Q. Mr. Propst, I want to be sure that you understand what I am trying to find out from you.

From this point (indicating) to the base of the pole, do you not see, as you look at this picture, a color which would indicate, which looks like soil on the pole? A. It has a different color, definitely a different color.

198 Q. If this color is a faint color, if this picture represents a fair representation of the color that really existed, it is the same general color as dried soil, is it not? A. Yes.

Q. Your answer is "yes"? A. Yes.

Q. And you are familiar with dried soil on objects, are you not? A. Yes, I am.

Q. The morning on which this accident occurred, the schedule called for pouring a curb, did it not? A. That is right.

Q. And this form which is behind the pole in the picture is the form which was to contain the concrete for the curb when it was poured? A. Part of it, yes.

Q. What was the other part? A. There is two sections to be installed in front of that.

Q. Two sections—I beg your pardon? A. There is two more sections connected with that, which determines the depth of the gutter. That is the back panel.

199 Q. That is the back panel (indicating)? A. That is right.

Q. This is the panel, closer to the center of the street or farther away from it? A. Farthest away.

Q. Do you see in this picture the other form, the front panel? A. Yes.

Q. Can you come down and show the jury what is the front panel? A. This is the front panel (indicating).

Q. Now, Mr. Propst, stay right where you are and I will ask you one or two more questions.

Had the forms been put in place up to a point some little distance away from this pole in question? A. That is right.

Q. Sometime before that particular day? A. Prior to that date they had.

Q. The concrete curb had been poured up to that point? A. That is right.

Q. Is there any point in this picture—had it come up as far as any point in this picture? A. No, this picture doesn't show any poured gutter.

Q. Do you know whether or not these forms were
200 put in shortly after the accident?

A. Yes, they were.

* * * * *

201 Q. Do you remember this bulldozer working at that time? (Indicating). A. Yes; that bulldozer belonged to the Woodner Company and was work-

202 ing on the job at that time.

Q. And in that area? A. In the area, yes.

Q. Do you know where the wires from that pole ran to? A. The wires from that pole ran out in four separate directions.

Q. Did one of them run to this building (indicating)? A. One of them went to that building shown there.

Q. Was there a shed of some kind up here, farther to the left? A. Yes. There was a shed on this side of the street (indicating).

Q. Did wires go to that shed? A. Yes.

Q. On which side of the street? A. It would be east side. That curb sits on the west side.

Q. So as you are facing the picture we are looking in a westerly direction? A. That is right.

Q. And the shed would have been on the side of the street opposite where you see the pole lying? A. That is right.

Q. Was there another building farther down to 203 the left on the west side of the street? A. No. There was another building right across the street from that building, the same type of building, same size, and everything.

Q. The wires ran to that? A. Yes, sir.

Q. When you looked at the pole on the morning of this accident, did it have any wires still affixed to it? A. Nothing but short stubs where it had been cut.

Mr. Jackson: I have no further questions.

Redirect Examination

By Mr. Melrod:

Q. Do you know when they were cut? A. I would say about 8:30 in the morning.

Q. Mr. Propst, Mr. Jackson was asking you about the lighter area from the stub until about this point here (indicating) where some of the bark appears to be off. Do you remember that? A. Yes.

Q. My question to you is, Mr. Propst: When you looked at the tree with the naked eye right after the accident when you came up to the scene, could you see anything on it that would be unusual to show where it had been in the ground? A. I wouldn't say I saw anything unusual, but that pole was dirty and scarred up halfway up 204 the pole.

Q. In other words, it looked dirty and scarred up all the way up; there was nothing unusual about it at the lower end, was there?

Mr. Jackson: I object, for the same reason.

Mr. Melrod: This is redirect.

Mr. Jackson: He has a right to go in the matter?

The Court: Read the question.

(Question read.)

The Court: I will overrule the objection.

The Witness: I wouldn't say there was anything unusual at the extreme lower end. I mean by that, you could only tell it had been in the ground a short distance; I would say eight or nine inches.

By Mr. Melrod:

Q. That is all you could notice? A. That is all I could notice as a definite fact.

Mr. Melrod: That is all.

* * * * *

205 The Court: I don't believe the witness has testified about the depth of the pole. Do you know how deep the pole was in the ground?

The Witness: I don't know in inches how deep it was installed. The only thing that I know is that after it was installed, a man climbed it and put wires on it.

Mr. Melrod: That is in the first instance?

The Witness: Yes. And the pole stood erect during the course of the job.

Mr. Melrod: And when you looked at it after the accident and saw the fresh earth, where it had come out what did it show as to the depth it appeared to have been in at that time?

* * * * *

Mr. Melrod: All right. Let him answer it.

206 The Court: Do you know what the question is? Would you like to have it read?

The Witness: No. It showed some frozen ground hanging fast to the pole.

Further Redirect Examination

By Mr. Melrod:

Q. How many inches up the pole was that? A. I would say approximately eight inches.

Mr. Melrod: That is all.

Further Recross Examination

By Mr. Jackson:

Q. When you went to look at the pole you weren't looking at it for the purpose of climbing it, were you? A. No.

Q. It was on the ground then? A. That is right.

Q. I understood you to say on direct examination—correct me if I am incorrect about it—that you didn't examine the pole too closely at that time. A. No, I didn't make a close examination. That is, Judge, I say, the only thing that I can say now about the pole was that I saw this little clump of dirt hanging on the bottom of it.

Q. And you didn't go there for the purpose of looking at it, knowing that you would be likely to be called
207 to testify about it? A. No, I didn't.

Q. And you didn't make the kind of inspection that you would have made had you known a couple of lawyers were going to sit and ask you a lot of questions about it? A. No. I would have made a better one.

Q. You would have looked better? A. Yes, sir.

Mr. Jackson: That is all.

(Witness excused).

Mr. Melrod: May we approach the bench?

The Court: Yes.

(Counsel approached the bench and the following proceedings were had out of the hearing of the jury):

Mr. Melrod: With the exception of my bills which Mr. Jackson has indicated he will stipulate to—

Mr. Jackson: No, I have not indicated I will stipulate to them.

Mr. Melrod: I thought you agreed if I gave you the amounts—

Mr. Jackson: I agreed we would talk about it.

The Court: I found some decisions that say in these workmen's compensation cases, that it doesn't make any difference who pays them, they are entitled to show the amount. Did you have a stipulation about it?

208 Mr. Jackson: The stipulation they would be admitted without formal proof. He may offer them and have them before the jury. I think the simplest way to do it—

Mr. Melrod: Do you want to excuse the jury? I am through with my case. I suppose he is going to make his motion.

The Court: Do you want that done?

Mr. Jackson: I want to put Mr. McKenney on. I think I will not make a motion now because Mr. McKenney is going to be away. I think I will save my motion to the end of the case.

I want to get Mr. McKenney because he will not be in town. If you are going to close your case—to tell you the honest truth, I think the simplest way to do this thing, and I won't object to it, is for you to read to the jury these bills, leaving out, of course, the Home Indemnity item. I am willing to do that.

Mr. Melrod: I will read them now to the jury, who they are from, and the amounts.

Mr. Jackson: And then the jury won't see that on there.

Mr. Melrod: I will do that now.

* * * * *

209 Thereupon **William Emory McKenney** was called as a witness for and on behalf of the defendant, and having been first duly sworn, was examined and testified as follows:

210 Direct Examination

By Mr. Jackson:

Q. Will you please state your full name? A. William Emory McKenney.

Q. What is your business? A. Electrical contractor.

Q. Where do you live? A. 616 Woodside Parkway, Silver Spring, Maryland.

Q. How long have you lived there? A. Since July of 1949.

Q. In February of 1950, what was your business connection? A. I was operating the Colonial Electric Company, Inc.

Q. What was your relation to the Jonathan Woodner Company, if any? A. I was subcontractor for their general building.

Q. On what job, in Prince Georges County, Maryland? A. University Hills Apartments.

Q. When did you begin work on that job? A. My best recollection would be around the middle of July, 1949.

Q. In July of 1949, where was the office of your company?

A. What office do you mean? We had two.

211 Q. The office where you kept your business records and from which you did your principal business. A. We had an office in the basement of my home where we kept our stock of supplies and the records of the business. We also had an office, or office arrangement, at 14th Street Northwest, for the purpose of holding a business license in the District of Columbia.

Q. Where did you keep your business records? A. In my home, in the basement of my home.

Q. And your home was where at that time? A. 500 Holstein Avenue, Takoma Park, Maryland.

Q. In what county of Maryland is that? A. That is in Montgomery County.

Q. To what extent did you transact business from the office in the District of Columbia? A. Very little. We rented desk space from my accountant and used that address as the address from which we held a license to operate in the District of Columbia.

Q. Did you have a name on the door? A. No, sir.

Q. Did you keep an employee stationed there? A. No, sir.

Q. From what office, which office, did you hire your
212 employees? A. That varied from time to time. It would be either on the jobsite where the man reported to work, over the telephone, or at my home.

Q. With respect to Ernest W. Mather, do you remember his being on your payroll? A. Yes, sir.

Q. Do you know when he went on your payroll? A. Yes, sir.

Q. When? A. According to my records, in June of 1949.

Q. Where was he employed? A. He worked wherever we had a job for him.

Q. Where did you make your contract with him for employment? A. I don't remember.

Q. Can you remember whether you made your contract with him either at your home or on the job? A. I don't remember.

Q. Did you make contracts of employment from your office in the District of Columbia? A. No, sir.

Q. From that are you able to say whether you made your
213 contract of employment with him either at your office, in your home or on the job? A. It would be one of those two; either at home or on the job.

Q. Were you an incorporated company at that time? A. Yes, sir.

Q. Where were you incorporated? A. Delaware.

Q. What was the purpose, if any, of having an office in the District of Columbia? A. In order to maintain a business license to do business in the District of Columbia.

Q. Do you know when you actually began work on the University Hills job? A. Not the exact date.

Q. Do you know whether it was in June? A. I don't believe it was in June. We didn't sign a contract with the Woodner Company until July.

Q. From, let's say November 1, 1949, until February 20, 1950, do you know where Mr. Mather worked, where he actually worked? A. Yes, sir.

Q. Where did he work? A. Let me look. What date was that you asked for?

Q. Go all the way back if you have it. Do you have
214 it back in June? A. I have his record of employment from the 4th of September through the 20th of February, 1950.

Q. Are you able to say that you have any other records showing he was on your payroll from earlier than the 4th of September? A. I have a payroll book.

Q. Do you have it with you? A. No, I don't.

Q. You have looked at it? A. Yes, sir.

Q. Will you tell us where Mr. Mather worked from the time your records in hand show until February 20, 1950? A. They show record of employment in the District of Columbia, Virginia and Maryland.

Q. Let us know on September 4 where he was working. A. On September 4, he worked 40 hours in the District of Columbia and 4 hours in Maryland that week.

Q. Will you take the next week? A. The next week he worked—

The Court: That would be the week of what?

The Witness: The week ending September 11, he worked approximately 23 hours in the District of Columbia and 16½ hours in the State of Maryland.

On the 18th of September, the week ending the
215 18th of September, he worked approximately 33 hours in Maryland and 6½ hours in the District of Columbia, and 15½ hours in Virginia.

On the week ending the 17th, he worked a total of 48½ hours in Maryland.

The Court: That would be the 17th of what?

The Witness: September 17, 1949. The week ending September 25, 1949, he worked in the State of Maryland for 47½ hours.

By Mr. Jackson:

Q. On what job? A. University Hills.

And one other job, Red Top Road, which was in Prince Georges County also.

On the week ending October 2, 1949, he worked in Maryland for 36½ hours and in Virginia for 8 hours.

On the week ending October 9, he worked in Maryland a total of 36½ hours.

On the week ending October 23, he worked in Maryland a total of 52 hours.

On the week ending October 30, he worked in Maryland a total of 35 hours and in the District of Columbia 13 hours.

On the week ending November 6, he worked in
216 Maryland 30½ hours and in Virginia 16 hours.

On the week ending November 13, he worked 40 hours in Maryland.

On the week ending November 20 he worked in Maryland a total of 41½ hours and in the District of Columbia 6½ hours.

On the week ending November 27, he worked 24 hours in the State of Maryland.

On the week ending December 4, 1949, he worked 48 hours in the State of Maryland.

From that point on, continued to work only in the State of Maryland until the time of his accident.

Q. And on what job? A. On University Hills.

Q. So that according to your records, from November 27, 1949 until February 20, 1950, Mr. Mather had been continuously at work six days a week—is that right? A. Not always. There were times when overtime was worked.

Q. Five days a week at least? A. The normal work week would be five days a week, yes.

Q. From November 27, 1949 to February 20, 1950? A. It would be from November 17 through February 20.

217 Q. And he did not work for you at any other place?

A. No, sir.

Q. Mr. McKenney, how long have you been in the electrical business? A. Since 1945.

Q. Do you remember the occasion when Mr. Mather had his accident? A. Yes, sir.

Q. Did you go out on the job? A. I did.

Q. How soon after the accident? A. I would guess it to be somewhere between 12 and 2 of the same day.

Q. Did anyone point out to you the pole from which he fell? A. Yes, sir.

Q. Or which fell with him? A. Yes.

Q. Did you see it? A. Yes, sir.

Q. Did you examine it? A. I did.

Q. What did you notice about it? A. It was lying
218 on the street up against the curb line. It showed evidence of having been in the ground for a very short distance and at the time I saw it, the wires had been removed and it had been moved from the original position in which it fell.

Q. To what other position? A. I was told at the time by someone—I don't recall who—that the pole had been pushed away from the middle of the street back up to the edge of the curb.

Q. Did you have a camera with you at that time? A. Yes, sir.

Q. Do you have any recollection of taking pictures? A. I did take pictures.

Q. Do you know whether or not they were color photographs or plain black and white? A. I took some color photographs.

Q. What size camera? A. 35 millimeter.

Q. Are you able to identify this picture which I show you as Defendant's Exhibit 2D, as being the same size as was used in your camera? A. It is the same size.

Mr. Jackson: Mr. Photographer, will you exhibit the one which is in the machine, which is 2D? The picture is now exhibit.

219 By Mr. Jackson:

Q. Are you able to recognize the pole which appears in the picture? A. It appears like the one I saw. I couldn't positively say it is, but it looks very much like it.

Q. Is it in substantially the same position as when you saw it? A. Yes, sir.

Q. Are you able to say whether you took that picture or not? A. No, I am not.

Q. You are not sure of it? A. No, sir.

Q. Do you recall whether or not the area around the pole is in the same general condition as it was the day when you were out there and took the pictures? A. I would say it is pretty much the same as I recall it.

Q. What time did you arrive? A. I believe it was somewhere between 12 and 2. I am not sure of the time. It was after lunch.

Q. Do you know where the pictures are that you took? A. No, sir.

Q. Do you know whether you have them?

220 A. I can't find them.

Q. Do you have any recollection of having given them to anyone? A. No, I don't.

Q. When you examined the area just back of this dark line (indicating) can you tell us whether or not when you got there on the job and took your pictures, the area back of the dark line was in the condition which you see it in the picture? A. I believe it was substantially as shown on the screen.

Q. Do you have any recollection whether—do you know what this dark line is (indicating)? A. Yes, sir.

Q. What is it? A. It is the forms for a curb and gutter.

Q. Do you recall whether or not that form was in when you got there? A. I don't recall whether it was concrete in it or whether the form was there.

I know there was something there. Whether it was that or not, I couldn't positively say.

Q. Were you on the job frequently? A. Yes.

221 Q. How often? A. Once or twice a week at least.

Q. When you examined the pole on the afternoon you got there, was it substantially in the condition you see it in the picture? A. Yes, sir.

Q. Are you able to see a discoloration or change in color from the point where I hold my finger (indicating) to the base of the pole? A. I don't quite know what you mean. It looks to be pretty much the same to me.

Q. Will you come down over here? I think you can see it better if you are not too close. When you examined the pole, were you able to see and dried or caked soil above the base or the bottom of the pole? A. Yes, sir.

Q. Can you indicate with your finger by pointing to the pole approximately the extent of the pole it extended? A. It would be strictly a guess but I would say this line about in here (indicating) would indicate it.

Q. You have pointed about midway of an area which the bark appears to have been skinned from the pole? A. Yes, sir.

222 Q. Do you remember seeing this area where the bark was skinned from the pole here where I hold my pencil (indicating) to here (indicating)? A. Yes, sir.

Q. You say that the area of dried dirt or soil that you described extended about midway into that area? A. That would be my guess, as I remember it.

Q. Will you resume your chair?

Mr. Jackson: Mr. Photographer, will you show Exhibit No. 2A?

By Mr. Jackson:

Q. Can you tell me and the Court and the Jury whether—will you step down here and point to the place on this pole now on this picture where you recall, to your best recollection, the area of dried dirt or soil extended? A. Right here (indicating).

* * * * *

224 Q. Did you know what Mr. Mather's experience was as an electrician? A. I know what he told me and I know what he proved himself to be while working for me.

Q. Do you know whether he told you he was a lineman? A. I believe he told me that he had worked in the past for a company who did line work.

Q. Whose job on this project was it to affix wires to poles? A. Any one of the men who happened to be assigned to it by the foreman and who was willing to do it.

Q. With respect to the principal contractor or the subcontractor, whose job was it? A. It was our job.

Q. Whose job was it to remove wires from poles? A. That, too, was our job.

Q. Whose job was it to put a pole in place? A. 225 The Jonathan Woodner Company.

Q. And to remove the pole after the wires were taken off? A. The Jonathan Woodner Company.

Q. Have you watched linemen take wires down from poles? A. I have.

Q. Do you know what is the custom or practice with respect to inspecting a pole before it is climbed?

Mr. Melrod: I object, your Honor. This man is not qualified for that.

The Court: Objection sustained.

By Mr. Jackson:

Q. Do you know whether or not the business or trade of climbing a pole, or pole climbing, or the business of linemen is a special trade or skill?

Mr. Melrod: I object, for the same reasons.

The Court: What is the purpose of asking him these questions?

Mr. Jackson: I think it is relevant to this issue as to whether or not there was a special trade involved in going up poles as distinguished from the kind of an electrician who doesn't.

The Court: How much of removing of wires have you seen, Mr. McKenney?

226 The Witness: I couldn't honestly say. It has been over a period of all my time in the construction industry that I have seen temporary services put up and taken down; also the power company putting up services or removing wires from poles and wires in areas where we were to build.

I wouldn't say any of it is a specialized thing. It is just general construction practice.

The Court: I will overrule the objection. He may answer.

Mr. Jackson: Read the question.

(Question read.)

The Court: Is it an occasional job that requires the erection of these poles or is it done on all the construction jobs?

The Witness: I would say that jobs of this particular type most always requires the erection of temporary service poles.

The Court: Is this your special field, of doing jobs of this type?

The Witness: We have done all types. We have done about as much of this as we have house wiring.

The Court: You may answer the question.

Mr. Jackson: I think the question was whether a special skill, trade, is involved in the matter of climbing
227 poles, doing pole work.

The Witness: I don't know whether a special skill is involved. I do know that men are hired by some companies for the work of linemen only. A general electrical contractor does not go out and hire a man specifically for climbing poles.

227 Mr. Jackson: May we approach the bench about another matter?

The Court: Ladies and gentlemen, I am going to give you a short recess.

(Jury excused.)

Mr. Jackson: I want to ask the witness—it is involved in some of the other problems of the case—whether he carried workmen's compensation insurance in Maryland on his employees.

Now, he has testified that his main office was in his home. He doesn't recall specifically where Mather was employed.

The Court: I understood him to say—I may be mistaken—that he at first employed this man in June and then he gives the employment record beginning first in September.

Mr. Jackson: Yes. He does not have the time sheets with him. I can send him back to get the record. I am not particularly concerned with that myself.

228 Actually there are two things that are of importance to us and to your Honor. One is whether the contract of employment—whether the situs of his employment has now been sufficiently established to justify a conclusion that the parties in any view of the case could be governed by Maryland law, because he was employed—I mean the principal place of Colonial Electric's business was in the basement of his home and this District of Columbia office was a nominal thing. It wasn't even his office. It was a mere name and it was where he had an accountant.

He was in effect locating an office here in order to be able to do business in the District of Columbia. His employees were employed either on the job—I mean the initial contract was made either on the job or at his home—but the contract between them ran into the State of Maryland because that was where he had his principal office.

Here is a Delaware Corporation with the principal place of business in Maryland, with a technical office in the District of Columbia.

We know, as a matter of law, he is required to maintain a technical office in the State of Delaware. The situs is fixed. One of two things must take place:

One, your Honor must determine as a fact on voir dire or otherwise, that all the factors involved—

229 The Court: Before we get into that, it seems to me this witness is very unsatisfactory. You asked him, and he says he does not remember—"I do not remember", he said. I don't know where he holds the meetings of his corporation.

Just by a process of elimination he says that he thinks that it was either one of these places—on the job or over there.

Mr. Jackson: It was either on the job or from his home.

The Court: He has no recollection of his employment of this young man. This man has testified positively on the other hand. He doesn't produce his records where he worked for him first.

Mr. Melrod: When the proper time comes, I am going to move this man's testimony be sent to the District Attorney. If your Honor will look in the record, he swore under oath that this contract of employment was in the District of Columbia, that his principal place of business was in the District of Columbia.

* * * * *

230 Mr. Jackson: I wanted to ask the witness, or maybe Mr. Melrod to avoid the problem to stipulate that Mr. McKenney's company maintained workmen's compensation insurance in Maryland.

I want that in case this case goes to the Court of Appeals, to be in the record, because the fact is, as I understand it, that his company carried workmen's compensation, complied with the laws of both Maryland and of the District of Columbia.

Mr. Melrod: I will so stipulate, if that is true.

The Court: Will that satisfy you?

Mr. Jackson: Yes.

231 Mr. Melrod: You informed me that is a fact.

Mr. Jackson: That is what Mr. McKenney told me.

Mr. Melrod: If Mr. Jackson will look at the record and says that is the fact, I will stipulate that.

I don't rely on what this man says.

Mr. Jackson: If I may do that overnight, —I don't have the record.

The Court: If you want him to testify you may ask him out of the hearing of the jury.

Mr. Jackson: I was going to ask him if he carried workmen's compensation insurance. He doesn't have the policy but he knows whether he paid premiums for that purpose.

The Court: You mean you want to call him in here?

Mr. Melrod: I have no objection. I would like your Honor to read that affidavit of Mr. McKenney.

The Court: As soon as you finish that question, we will take a recess of a few minutes.

Thereupon, *William Emory McKenney* resumed the stand, and having been previously duly sworn, was examined and testified further as follows:

(The following proceedings were had out of the
232 hearing of the jury.)

Direct Examination (Continued)

By Mr. Jackson:

Q. Mr. McKenney, there is no jury here. I wish you would answer this question for us:

Do you know whether or not at the time Mr. Mather was employed you carried workmen's compensation to cover your company in Maryland? A. We did.

Q. And how about the District of Columbia? A. We had a policy that covered us in the District, Virginia and Maryland.

Q. Do you remember the company? A. The Home Indemnity Company.

* * * * *

233 (The following proceedings were held in open court before the jury:)

The Court: Let's resume.

Mr. Melrod: Does your Honor have the court file?

The Court: Yes.

Cross Examination

By Mr. Melrod:

Q. Mr. McKenney, when you were asked by Mr. Jackson as to where you first hired Mr. Mather and as I recall, your reply was that you just didn't remember where he was first hired; is that right? A. That is right.

Q. Would you look at this affidavit and tell me, Mr. 234 McKenney, if that is your signature or not? A. It is.

Q. Will you read this affidavit over and tell me after you have read it, whether or not it refreshes your recollection—by the way, this was signed on July 3, 1950, wasn't it? A. That is right.

Q. And this sentence appears in it, as follows:

"The employment contract between the Colonial Electric Company, Inc. and said Ernest Mather was entered into in the District of Columbia".

Now, on July 3, 1950, you swore to that. Does that refresh your recollection that you did hire him first in the District of Columbia? A. I signed that statement but I still don't remember whether I hired him in the District of Columbia or not. Apparently I said that I did.

Q. So that on July 3, 1950 you swore at that time before you came here, that you did hire him in the District of Columbia? A. That is what the statement says.

Q. And at the time you swore to it, was that a true statement? A. As far as I know, yes.

Q. You told us here in reply to Mr. Jackson's ques- 235 tioning that your principal place of business was at your home; is that correct? A. It all depends on how you define "principal place of business."

Q. You told Mr. Jackson that, didn't you, on direct examination? A. I told him that if you considered where the

stock and material and records of the company were kept, if that was the principal place of business, the principal place of business was at home.

Q. That is what you told him here today. I ask you to look at this affidavit that you swore to on July 3 and I read you this sentence and see if this refreshes your recollection:

"I, William McKenney, president of the Colonial Electric Company, Inc., being first duly sworn, under oath, according to law, hereby depose and say that the above corporation has its principal place of business, formerly 925 New York Avenue Northwest and now at 3308 14th Street Northwest in the District of Columbia."

Did you swear to that on July 3, 1950? A. I did.

Q. Was that a true and correct statement of you
236 on that date? A. As I understood the term, "principal place of business," yes.

Q. So on July 3, 1950, when you swore to it under this affidavit you considered at that time that your principal place of business was in the District of Columbia? A. That is correct.

Q. Since that time, you have learned and changed your mind; is that right? I withdraw that question. A. May I ask you a question?

The Court: No.

By Mr. Melrod:

Q. Now, you have brought here certain records for the jury and you brought the records beginning September of 1949; is that correct? A. That is correct.

Q. You know that Mr. Mather was employed by you the first time in June of 1949, don't you? A. Yes.

Q. And you swore in this affidavit on July 3, 1950 that on June 16, 1949, the Colonial Electric Company hired Ernest Mather, plaintiff, as an electrician and insulation man and wire man; is that a true statement? A. That is a true statement.

237 Q. You didn't bring for the jury the records from June 16 to September, 1949, did you? A. No, sir.

Mr. Jackson: Ask him why not.

Mr. Melrod: You may ask him when you examine him.

By Mr. Melrod:

Q. The jury can draw its own conclusion about that.

Now, you told the jury and you read to the jury these statements showing how many hours of employment he put in from these records, didn't you? A. Yes, sir.

Q. You read the various Maryland employments, and so forth, didn't you? A. I did.

Q. I show you this statement you swore to on July 3, 1950 and I read this to you:

"That Mather was between the period of June 16, 1949 and February 20, 1950, employed almost half the time in the District of Columbia."

Was that a true statement sworn to by you that time? A. It still is a true statement.

Q. And is this a true statement, that you swore to:

238 "That at all times during the course of Mather's employment . . . Mather was under the control and subject to orders from the Colonial Electric Company's principal place of business in the District of Columbia".

Is that a true statement and sworn to by you? A. If that is on that paper, yes.

Mr. Melrod: Could you put the lights out again so I can show you these photographs once again?

By Mr. Melrod:

Q. Do you recall, Mr. McKenney—you were asked a question by Mr. Jackson as to the fact that you could see a dirt mark and you pointed out to him that that dirt mark was somewhere midway between the bark—do you remember stating that? A. I do.

Mr. Melrod: Show it closer up, the picture of it.

By Mr. Melrod:

Q. I think that is 2A. Do you wish the jury to believe that you could look at this bark and tell us that the dirt mark was clearly in between that bark? Is that your testimony? A. As I remember it, yes.

Q. Is that your testimony today? A. It would appear that there is dirt there.

239 Q. You say it appears there is dirt half way up this bark? A. I would say so, yes.

Q. That is the mark that you saw? A. That is one of them.

Mr. Melrod: May we see the larger film showing the bulldozer in the back?

By Mr. Melrod:

Q. Now Mr. Jackson asked you whether or not this curb line and this condition of the area was as you saw it on that first day and you answered, "Yes." A. I said that was as I remembered it.

Q. If I told you that the carpenter foreman in charge of the job for Jonathan Woodner Corporation, who was there and saw to the removal of the pole, stated that this condition did not exist at the time that Mather fell and that this form and the breaking or grading of the area took place after he fell, would that in any way change your testimony? A. Not at all.

Q. You still say the same thing? A. Yes, sir.

Q. Mr. McKenney, you told Mr. Jackson on direct examination that your business was that of an electrical
240 contractor, didn't you? A. That is right.

Q. As a matter of fact, isn't it true, Mr. McKenney, that you are now associated with the Jonathan Woodner Corporation? A. No.

Q. You say no. Tell us why you say no. A. The stock of Colonial Electric Company was sold to Shipley Terrace Corporation in September of 1950.

Q. Who owns the Shipley Terrace Corporation? A. I don't know for sure.

Q. Tell us what your association with Jonathan Woodner Corporation is at the present time. A. I do practically all of their electrical work.

Q. Actually haven't you some kind of arrangement where you are only working for the Jonathan Woodner Corporation? A. No, sir.

Q. You have no place of business at this time, have you? A. Yes, sir.

Q. Where do you report for work each day? A. Wherever I happen to be, whether it be the job or the office.

Q. What jobs are you working on for Jonathan
241 Woodner Corporation at this time? A. We have a job in Virginia called Woodley Homes and one in Cincinnati called Swifton Village.

Q. Those are the two jobs that you are working on for Jonathan Woodner Corporation? A. That is correct.

Q. And those two jobs—do you just have the ordinary subcontractor's arrangement with him? A. I have a definite contract for a specific price, bid for and received.

Q. Don't you have some arrangement with the Jonathan Woodner Corporation regarding the labor situation and the use of non-union help and so forth? Can you tell the jury about that? A. How do you mean?

Q. I don't know. I want to find out. Do you have some arrangement with the Jonathan Woodner Corporation regarding the use—I will put it to you this way: Didn't the Jonathan Woodner Corporation enter into these contracts with you so that non-union help could be used; isn't that true? A. That is not true.

Q. What are the circumstances? A. The circumstances
242 are that in September of 1950 I was going to close up the Colonial Electric Company, finish the jobs we had on hand and get out of the business.

At that point the Shipley Terrace Corporation bought the stock of the company, kept me on as an employee of the corporation and we continued to do business in the same manner.

We contracted for work both within the Jonathan Woodner Company structure and outside of it.

Q. Do you know whether Jonathan Woodner, himself, or his corporation has any association with the Shipley Terrace Corporation? A. I believe there is a connection.

Q. So that the Shipley Terrace Corporation is associated or connected or owned by the Jonathan Woodner Corporation. Is that correct? A. That is not my understanding.

Q. What is your understanding as to the relationship of the Shipley Terrace Corporation and the Woodner Corporation?

Mr. Jackson: May it please your Honor, I have not objected because it didn't seem to be very important, and it really isn't important now.

This is all irrelevant and immaterial and has nothing to do with the issues that this jury has to decide. I object to it.

243 In the first place, it is objectionable because it calls for hearsay testimony of the witness. If he wants to prove that sort of thing, there are records.

The Court: What is the specific objection to?

Mr. Jackson: I object because it is irrelevant and immaterial, and it calls for hearsay testimony.

The Court: I will overrule the objection. I think he is entitled to show any relationship he has to the defendant.

Mr. Melrod: Will you please read back my last question?

(Pending question read.)

The Witness: As I understand it, the Shipley Terrace Corporation owns both the McKenney Electric Company and the Jonathan Woodner Company.

By Mr. Melrod:

Q. Your understanding is that the Shipley Terrace Corporation owns the Jonathan Woodner Corporation and your company? A. As far as I know. I am not sure of it, even.

Mr. Melrod: That is all; you may inquire.

Mr. Jackson: I move that answer be stricken on the ground that the witness is saying something of which he has no knowledge and of which he is not sure.

The Court: The motion is granted. It will be
244 stricken. Disregard the answer.

Mr. Jackson: I ask the jury be instructed to disregard the answer.

The Court: I did so instruct the jury.

Mr. Melrod: Is your Honor doing it on the ground that he says he believes it to be so?

The Court: He says he doesn't know.

Mr. Melrod: I understood him to say, if I understood his answer correctly, that he believes or understands that the Shipley Terrace Corporation owns the Jonathan Woodner Corporation and his company, McKenney Electric Corporation. Is that what you stated?

The Witness: I said as far as I knew or had been led to believe, the Shipley Terrace Corporation owns them both. I do not positively know it to be so.

Mr. Melrod: I think he can testify to what he believes to be so.

The Court: I stand on the sustaining of the objection as to that particular question and answer.

Mr. Melrod: Very well. You may inquire.

244 Redirect Examination

By Mr. Jackson:

Q. Mr. McKenney, tell me when you first met me. A. I saw you about a week ago, I guess.

245 Q. The first time you had ever seen me? A. As far as I know.

Q. Or anybody connected with my law firm? A. I don't recall ever having seen you or anyone from it before.

Q. Do you know how you came to sign the affidavit that Mr. Melrod has shown you? A. I believe that the affidavit

was prepared after a telephone conversation or at his office; I don't remember, but it was read by me and at that time I believed it to be the truth. I still do.

Q. Who asked you to sign it? A. I don't remember.

Q. Do you remember on whose behalf you were asked to sign it? A. I don't recall whether it was a matter of record or whether it was in someone's behalf or not. In fact, I don't remember signing it, but I apparently signed it.

Q. There is an insertion made in the affidavit, "Formerly at 925 New York Avenue". Do you see, "Formerly 925" there? A. I do.

Q. Do you know who made that insertion? A. No, sir.

246 Q. Do you know whether you made it? A. I am quite sure I did not. It isn't my writing.

Q. Isn't it a fact that at one time your company had a listed office at 925 New York Avenue? A. It is.

Q. What did the company have in that office? A. A mail box on the front door.

Q. From where did you actually do business at the time the mail box office was at 925 New York Avenue? A. The basement of my home.

Q. Who else was there, if anyone, at 925 New York Avenue Northwest? A. That was the office of Capitol View Realty Company.

Q. Why did you use the address 925 New York Avenue Northwest? A. For the purpose of holding a business license in the District of Columbia. The law requires it.

Q. In order to comply with the law? A. That is correct.

Q. At 3308 14th Street Northwest, the language, "And now at 3308 14th Street Northwest" was also inserted; not in type, but by pen and ink. Do you know who made that insertion? A. No, I don't.

247 Q. Did in fact at the time this affidavit is dated, July 3, 1950, you have an office or address at 3308 14th Street Northwest? A. Yes, we did.

Q. What, in fact, of the company's property, books, records, employees, was located at 3308 14th Street, Northwest? A. Nothing.

Q. Who else was at that address? A. A man by the name of Arthur Rich.

Q. What, if any, relation did he have to your company? A. He was our accountant.

Q. How often, if at all, did he have or use the books of your company? A. Once a month.

Q. When he did what to it? A. He brought the records up to date, made the entries in the journal and took a trial balance.

Q. What did he do with the books? A. They were returned to me.

Q. Was there anyone else in any way connected with the company at that address? A. No, sir.

Q. As at that time where were the company's 248 books and records kept? A. They were kept at my home.

Q. And your home was in Takoma Park, Montgomery County, Maryland? A. That is right.

Mr. Melrod: Your Honor, he has gone through all of this on direct. I don't see any purpose of going through it again. I object to it on that ground.

Mr. Jackson: I think probably it is repetitious.

By Mr. Jackson:

Q. Mr. McKenney, why didn't you bring with you the same kind of time record that you have shown us for the period June 16 through September 4, 1950? A. I have not been able to find any records prior to the date that I brought.

Q. You said something about you had records, a record showing the date of employment. What record, if any, was that? A. That is a form of payroll book.

Q. Is that something different than these records that you have here? A. Yes.

Q. What are these records that you have shown us?

A. These are time cards made by the foreman or the
249 individual himself and turned in at the end of the
week in order to substantiate the time claimed for
payment for that week.

Q. How much trouble would it be for you to get the book
that shows the date of the original employment of Mr.
Mather? A. I would have to go up to the office and dig out
that, wherever it may be.

Q. If we recess over the weekend, would you be able to
get it in my hands before Monday morning? A. I would be
able to give it to you, yes, or the court.

Q. You wouldn't be able to be here Monday? A. I am
supposed to be in Cincinnati, Ohio on Monday. It is quite
important that I be there.

Q. How long do you intend to be there? A. I had in-
tended to be there for the balance of the month.

249 Q. At the time you signed this affidavit—strike
that. Did you prepare this affidavit yourself? A.
No, sir.

Q. Do you see in the lower left-hand corner of that,
printed, "Lubar, O'Keefe, Friedlander and Melrod,
250 Attorneys at Law, Washington, D. C."? A. I do.

Q. Does that refresh your recollection as to who
asked you to sign it? A. No, it doesn't.

Q. Or who prepared it? A. I can't say. I don't know. I
don't remember.

Mr. Jackson: Can we have a stipulation with you about
it one way or another?

Mr. Melrod: That is on my stationery as prepared by
our firm.

Mr. Jackson: In your office?

Mr. Melrod: In my office, yes.

Mr. Jackson: And it was filed in this court by you?

Mr. Melrod: Filed in this court by me; that is correct.

Mr. Jackson: I would like to exhibit the affidavit to the

jury. Mr. Melrod's firm is printed in the lower left-hand corner.

By Mr. Jackson:

Q. When you said in this affidavit, Mr. McKenney, that Mather was, between the period June 16, 1949 and February 20, 1950, employed almost half the time in the District of Columbia, when you made that statement, had you
251 gone to your records and made any computation? A. No, not at that time.

Q. You mean prior to the execution of that affidavit? A. I have not made any examination except the past week.

Q. The only computation is the bringing in the court of these records? A. That is the only thing that I can positively say occurred.

Mr. Jackson: I am through.

The Court: Have you any further questions, Mr. Melrod?

Recross Examination

By Mr. Melrod:

Q. Mr. Jackson asked you about the part that is written in handwriting. It originally said as follows, did it not: "That the above corporation has its principal place of business at 918 New York Avenue Northwest in the District of Columbia". That is what it said originally? A. That is correct.

Q. And then it was crossed out, and look at this carefully and see if that isn't your printing, and then someone wrote in there, crossed out "918" and wrote, "formerly 925 New York Avenue and now at 3308 14th Street Northwest."

252 Looking at that and looking at the handwriting, would you mind looking at it closely and see—it is really printed—and see if you recall that as your printing? A. I would say it is not.

Q. You don't deny, do you that that was put on there or that change from 918 New York Avenue Northwest to "925 New York Avenue and now 3308 - 14th Street" was put on before your signature? A. I don't know one way or the other.

Q. You won't deny it? A. It is a true statement in any event.

Q. It is true either way? A. Yes, sir.

Mr. Jackson: May I inquire whether this notary on there is a notary in your office?

Mr. Melrod: Yes. She was a former notary in my office.

Mr. Jackson: At the time this affidavit was executed?

Mr. Melrod: Yes. She is not with me any longer.

I have no further questions.

The Court: I would like to ask him a question or so. I understood you to say that your corporation, the Colonial Company, was a Delaware corporation? A.

That is correct.

253 The Court: Did you hold your meetings in Delaware?

The Witness: No, Ma'am.

The Court: Who were the officers besides yourself?

The Witness: My wife and John B. McKeever.

The Court: Who is John B. McKeever; is that the accountant? No. He was associated in this corporation with me.

The Court: Where were the business meetings held?

The Witness: My home.

The Court: What address in Delaware for their record there, the home office, did you give for your business address?

The Witness: 2325 Dover Green, Dover, Delaware.

The Court: I mean your address outside of Delaware.

The Witness: I believe we gave two addresses—one was originally 925 New York Avenue with a residency in Takoma Park. I am not exactly sure how that was done. I be-

lieve I was the resident agent of the corporation for the State of Maryland.

The Court: Who was the agent for the District of Columbia, if there was one?

A. I don't recall there being anyone. I don't know.

* * * * *

254 Mr. Jackson: I would like to make a motion on matters of law involved. Do we want to excuse the jury until Monday morning?

The Court: Have you concluded?

Mr. Jackson: Yes. The defendant's case is closed.

* * * * *

(At this point counsel for defendant made a motion for a directed verdict, and argument, which was not transcribed.)

* * * * *

255 The Court: At the conclusion of the case on Friday, the defendant moved for a directed verdict on two grounds: First, that contributory negligence had been shown as a matter of law; and second, that the accident occurred in Maryland. The Court overrules both motions.

With respect to the claim that the accident occurred in Maryland, the law passed by Congress with respect to the District of Columbia appears to cover this case, because it refers to any employment in the District of Columbia, and in the District of Columbia the contractor is not made the statutory employer of the employee of the subcontractor.

With respect to contributory negligence, in this case, this pole was installed by the defendant. It was the duty of the defendant to use reasonable care with respect to the installation and maintenance of the pole.

Under all the circumstances, I think it is a question for the jury, as to whether there was negligence and contributory negligence, the testimony being in conflict as to what the condition of the pole was immediately preceding the time that the plaintiff undertook to climb the pole.

DISCUSSION OF PRAYERS

The Court: So now, gentlemen, I will consider
256 whatever prayers you might have.

Mr. Jackson: I have prepared a number of prayers and I have given copies to Mr. Melrod. Mr. Melrod has some he has handed to me.

The Court: Let's take Mr. Melrod's first.

With regard to Prayer No. 1 of the plaintiff, have you any observations to make, Mr. Jackson?

Mr. Jackson: I think it is objectionable because it ignores the questions of contributory negligence and assumption of risk, and of course, it is inadequate and misleading to merely tell the jury that if the defendant was negligent and careless that they must bring in a verdict.

I object to it.

Mr. Melrod: In know your honor is going to instruct the jury on contributory negligence in any event. That is the reason each prayer doesn't specifically set that out. This prayer is a correct statement of the law.

The Court: It is a correct statement of the law, I think, but it doesn't say "unless".

Mr. Melrod: I have no objection to adding "unless the plaintiff's negligence itself caused the accident or was contributory."

I would like to amend that prayer by saying, "The jury are instructed as a matter of law that if you find
257 from a preponderance of the evidence—". It should say "preponderance of the evidence." I would like to amend it by adding that, "if you find by a preponderance of the evidence" on number 1.

The Court: I will add there at the bottom, "unless the defendant sustains one or more of its affirmative defenses."

Mr. Melrod: I will accept that modification.

Then that is accepted as modified.

The Court: Granted as amended.

In this plaintiff's requested Prayer No. 2, you omit reasonableness.

Mr. Melrod: What portion?

The Court: To make it reasonably safe.

Mr. Melrod: Yes. I accept that. Before the word, "safe" insert the word, "reasonably".

The Court: Yes.

Mr. Jackson: I want to make it clear—I gathered from what your Honor said in your opinion on motion for directed verdict that in your Honor's view, the defendant had a duty to install and maintain the pole.

Now, with respect to this and several other prayers so I can make this statement with respect to them, I don't feel that on a construction project, the defendant, as the
258 general contractor is under any duty to maintain the equipment in the kind of safe condition that it would be under a duty if it were the owner of the premises being used by persons other than workmen, and that it was not under a duty—

The Court: Suppose he didn't maintain it after he put it in the ground at proper depth, would you say that he had no duty to keep it secure enough not to fall on people around there?

Mr. Jackson: I do say so, that on a construction project that is part of the doctrine of assumption of risk, that on a construction project, with bulldozers working all around there, he cannot be, and the law doesn't put upon him the duty of maintaining a pole set in the ground so that when the plaintiff and the other workmen don't observe the ordinary and usual practice of safety, that it will not fall.

That is what happened, we contend in this case.

Mr. Melrod: You may argue whether or not he used due care but I deny that the law would be that a general contractor was not under a duty to maintain that pole in reasonably safe condition by a man who was instructed to climb it.

The Court: They are not under an absolute duty.
 259 They are only under a duty to exercise reasonable care.

Mr. Melrod: I will agree with you, that they are under a duty to exercise reasonable care to see that it is safe for his climbing.

The Court: I think this one will have to have the same thing added at the bottom of it.

Mr. Melrod: Yes. I will agree to that. The word "reasonably" is inserted before the word "safe" in line 3.

The Court: Yes.

Mr. Jackson: Your Honor, you will understand that I do not think that would cure it.

Mr. Jackson: The extent of reasonable and ordinary care is the real issue. The extent of reasonable
 260 and ordinary care on a construction project will require the general contractor to do all things that would be necessary to prevent injury if the employees did what they ordinarily do in their particular line of work.

I say that it has been admitted on the witness stand by the plaintiff that there were certain things that he didn't do. They are not obliged to anticipate that he would not do those things.

Therefore, when they disturbed the soil around the bottom of the pole they do so, well knowing and understanding that a lineman, before he climbs that, braces the pole or inspects it to make sure it is safe, and so on.

The Court: I think this business of disturbing the ground in that vicinity was much more apparent to the defendants' employees than it would have been to this plaintiff because of the fact that the plaintiff, a large part of his work, was on the inside of the buildings.

* * * * *

262 The Court: I will give your Prayer No. 3, inserting the word "reasonably" before the word "safe" and adding to it the same thing as was added to the others.

* * * * *

263 Mr. Melrod: Yes, I think I will withdraw No. 6.
7, I think, should be granted.

The Court: You left out all question of reasonableness.

Mr. Melrod: I think I should insert that, "required to, in reasonably safe condition" and I insert the word "reasonably" before the word "safe".

The Court: Mr. Jackson?

Mr. Jackson: I reiterate my objection to No. 7, that it incorrectly states the law on construction projects. It is absolutely impossible for a project in the process of construction to be maintained in safe condition. It is impossible, and it cannot be law.

The Court: Going back to your No. 2, you talk about the required depth. It seems to me it would be better to say "a depth in the ground."

Mr. Melrod: I think so, yes. How did you word that?

The Court: "Install and maintain the pole a depth in the ground to make it reasonably safe."

264 Mr. Melrod: I think that is better.

The Court: I am going to deny No. 7 in its form.

Mr. Melrod: Will your Honor cover the duty to warn or if they knew on the exercise of reasonable care?

The Court: Yes.

Mr. Melrod: If your Honor covers that, I will withdraw No. 7; if you will cover that in your general instructions.

The Court: I marked it "Denied" but I will cover it.

* * * * *
267 The Court: No. 9 is granted.

Now we will take up the defendant's prayers.
No. 1 is denied.

No. 2 is denied.

Mr. Jackson: When your Honor denies a prayer, I assume I don't have to make any formal objection?

The Court: No.

* * * * *

268 The Court: I will grant No. 3. This business
about assuring yourself seems to be an absolute re-
quirement, whereas he is only required to use reasonable
care.

Mr. Melrod: Not only that; I object to 4, 5 and 6, which
single out things which he read to him from some
269 book which is not in evidence, and certainly your
Honor, all your Honor is required to instruct the
jury is that this man was required to use ordinary and
reasonable care of a man engaged in that kind of work and
for your Honor to single out—and besides which, on 4, 5,
and 6 there is absolutely no proof offered by the defend-
ant, and any failure to have done these things would have
prevented that accident.

* * * * * * * * *

272 The Court: I think despite what this rule says,
that his duty was to exercise ordinary care and cau-
273 tion. As modified, I will grant No. 4.

Mr. Melrod: Is your Honor going to tell the jury
that he has to assure himself? I don't think there is any
duty to assure himself. In this case there was no way of
his knowing it.

The Court: I don't think assuring himself means any-
thing more than he is to use ordinary care under the cir-
cumstances.

Mr. Melrod: Your Honor is going to tell the jury all
he is required to do is use ordinary care?

The Court: Yes.

Mr. Melrod: We object to 4, of course.

The Court: No. 5 is denied.

No. 6 is denied.

* * * * * * * *

Mr. Melrod: 8, 9 and 10 are not the law. They all deal
with the assumption of risk. There is nothing about as-
sumption of risk in a case of this kind. It would only in-
volve master and servant relationship.

274 Jonathan Woodner was not the employer of this man.

The Court: Wait a minute. In this Uline Arena case, that question involved a claim of assumption of risk. While it was held in that case there was no assumption of risk, nevertheless, it was treated—

Mr. Melrod: You mean where the woman got hit with a hockey puck?

The Court: Yes.

Mr. Melrod: I am familiar with that case. Even in that case they didn't apply assumption of risk as the doctrine as he is trying to elaborate it here. He is trying to tell the jury that because this man was a workman, there was assumption of risk. That isn't the law.

The Court: I think that if he knew what the danger was or even if he didn't actually know or should have known, in the exercise of ordinary care, and if under these circumstances he went upon the pole, then I think it is fair to assume that he assumed the risk.

Mr. Melrod: I think what your Honor stated would be correct. If your Honor wishes to instruct the jury just what your Honor stated, I would have no objection to that. I think what your Honor stated is correct, a correct statement of the law. 8, 9 and 10 are not.

275 The Court: I will deny 8 but I will instruct them on assumption of risk.

* * * * *

Mr. Melrod: I object to 9 on the ground that even the first portion says "surrounded by some element of risk". that calls for speculation. Their duty is to provide a safe-place. Then it calls for a conclusion on the part of the witness. He is not charged in law with the knowledge of unfinished state of work.

276 The Court: Then he is required to furnish a reasonably safe place under the circumstances.

* * * * *

The Court: I guess I will deny No. 9.

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The Court: No. 10 is denied.

No. 11 is denied.

* * * * *

278 Mr. Jackson: May it please the Court, in discussions out of the presence of the jury, we identified an insurance policy of Jonathan Woodner Company with the Associated Indemnity Corporation.

Just so that in the event this case does get in the Court of Appeals, I would like to ask the Clerk to mark this policy as Defendant's Exhibit for identification No. 3.

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279 ACTION TAKEN BY COURT ON PRAYERS

Plaintiff's Prayer No. 1, as follows, as amended, was granted:

The jury are instructed as a matter of law that if you find from a preponderance of the evidence that the defendant was negligent and careless in grading around the pole so as to make the pole unsafe for the plaintiff to climb and that this negligence caused the pole to fall thereby injuring the plaintiff, then your verdict in this case must be for the plaintiff, unless the defendant sustains one or more of its affirmative defenses.

Plaintiff's Prayer No. 2, as follows, as amended, was granted:

The jury are instructed as a matter of law that the defendant was required to use reasonable and ordinary care to install and maintain the pole a depth in the ground to make it reasonably safe for the plaintiff to climb and if you find from the evidence that the defendant was negligent and careless in installing the pole or maintaining the pole and that this negligence was the proximate cause of the plaintiff's injuries then your verdict in this case must

be for the plaintiff unless the defendant sustains
280 one or more of its affirmative defenses.

Plaintiff's Prayer No. 3, as follows, as amended,
was granted:

The jury are instructed as a matter of law that the defendant, Jonathan Woodner Corporation, was under a duty to provide the plaintiff with a reasonably safe place to work and if you find from the evidence that the defendant was negligent and careless in grading around the pole so as to make it unsafe and failed to warn the plaintiff of this unsafe condition and that this failure caused the plaintiff to be injured then you are instructed that your verdict in this case must be for the plaintiff unless the defendant sustains one or more of its affirmative defenses.

* * * * *

283 Defendant's Prayer No. 1, as follows, was denied:

The jury are instructed as a matter of law that their verdict shall be for the defendant.

Defendant's Prayer No. 2, as follows, was denied:

The jury are instructed as a matter of law that if they find from the evidence that the ground around and in the vicinity of the temporary electric pole described in the evidence showed evidence of grading operations, the
284 plaintiff was charged with the duty of making more than a cursory or casual inspection of the pole to determine whether it was safe to climb; but he was charged with the duty of using all reasonable means of assuring himself that it was strong enough and securely enough set into the ground to bear his weight and to bear any altered strain resulting from cutting the wires; and if the jury find from the evidence that he failed to use all such reasonable means to assure himself as aforesaid, then the jury shall find that he was guilty of contributory negligence and their verdict shall be for the defendant.

Defendant's Prayer No. 3, as follows, was granted:

The jury are instructed as a matter of law that the usual and customary practices of linemen in climbing and cutting

wires on an electric pole are evidence of what the plaintiff ought to have done to protect himself from injury.

Defendant's Prayer No. 4, as modified, was granted as follows:

The jury are instructed as a matter of law that the plaintiff in his testimony has acknowledged that the following is a fair statement of one of the rules of safety to be followed in performing the task on which he was engaged at the time of his injury:

285 "Before climbing poles * * * first assure yourself that the pole * * * is strong enough to safely sustain your weight."

And you are instructed that if you find that the plaintiff failed to follow this rule of safety, and that this failure was a contributing cause of injury to plaintiff, then your verdict must be for the defendant.

Defendant's Prayer No. 5, as follows, was denied:

The jury are instructed as a matter of law that the plaintiff in his testimony has acknowledged that the following is a fair statement of one of the rules of safety to be followed in performing the task on which he was engaged at the time of his injury:

"On pole-replacement work no pole shall be climbed for the purpose of clearing it of all wires and cables without first guying or bracing the pole securely."

And you are instructed that if you find that the plaintiff failed to follow this rule of safety, then your verdict must be for the defendant.

* * * * *

286 Defendant's Prayer No. 7, as follows, was denied:

The jury are instructed as a matter of law that the plaintiff was at the time of his injury employed as a lineman and electrician and receiving pay as such, and thereby represented himself as qualified to perform the job he was engaged in at the time of his injury, that is, climbing a temporary electric pole and cutting the wires therefrom preparatory to a removal of the pole to permit

other construction work on the job to proceed; and having so represented himself as qualified as aforesaid, he is charged as a matter of law with knowledge of, and with following, the usual and customary safety rules for the job he was then performing.

Defendant's Prayer No. 8, as follows, was denied:

The jury are instructed as a matter of law that while a general contractor, on a construction project such as that called "University Hills" in Prince Georges County, Maryland, has the duty of using due care to avoid injury
287 to workmen engaged in constructing the buildings and grading the grounds, his use of due care or failure to do so must be determined in the light of all the circumstances. That is, what might be failure to use due care to avoid injury to a member of the public not working on the job might not be a failure to use due care insofar as workmen accustomed to the ordinary dangers of such work, such as the plaintiff, is concerned. And if the jury shall find that in the light of all the circumstances shown by the evidence the plaintiff was or should have been aware that it might be dangerous to climb a pole and cut wires affixed to it, then they shall find that the plaintiff assumed the risk the pole might fall, and their verdict shall be for the defendant.

Defendant's Prayer No. 9, as follows, was denied:

The jury are instructed as a matter of law that it is a matter of common knowledge that all construction activities are surrounded by some element of risk of injury, because on any project, where buildings are in the process of construction and the ground is in the process of grading, the buildings and the grounds are in an unfinished state, and the plaintiff as a workman on the project was in law charged with the knowledge of the unfinished state of the work which he could see or which he would have seen if he had looked.

Defendant's Prayer No. 10, as follows, was denied:

288 The jury are instructed as a matter of law that there are some dangers which a workman assumes in

the course of doing his work, and he may not recover damages for an injury resulting from a known danger the risk of which he has assumed; and in this case the jury must accept the fact that the plaintiff was a lineman, which is a trade skilled in climbing poles for the purpose of putting up or taking down electric wires; and if the jury find from the evidence that one of the known dangers of such a trade is that when climbed or when the wires are cut a pole might fall if not securely set in the ground to the proper depth or if the depth of the soil has been reduced by grading operations, or the soil has been loosened by grading operations, and if the jury further find that the plaintiff had been on the University Hills job for several months and knew of grading operations through seeing bulldozers at work in the vicinity of the pole in question and saw, or could have seen, that the ground in the vicinity of the pole was broken and disturbed; and if the jury find that a lineman using the ordinary and usual practice of safety rules of his trade should have assured himself that the pole was securely set before he climbed it; or if the jury find that he was uncertain whether it was securely set or not and that a lineman using ordinary care should have seen that the pole was guyed or braced before

289 he climbed it; or if the jury find that he should have made certain the pole was so securely set that it would not fall when some or all of the wires were cut; then the jury shall find that in climbing the pole the plaintiff assumed the risk that the pole would fall, and in such case their verdict shall be for the defendant.

* * * * *

290 COURT'S CHARGE TO THE JURY

The Court: Members of the Jury:

The taking of the testimony has been completed and the summations of counsel have been concluded.

Under our system of procedure, it now becomes my duty to charge the jury. When a case is tried before a jury, the

Court consists of the judge and the jury. The judge has the duty of presiding at the trial and passing upon questions of law as they arise, and finally, at this time, to instruct you with regard to the law applicable to the case.

The jury, on the other hand, are the judges of the facts and they are the exclusive judges of the facts. It is the jury's duty to determine, under the facts and the law as given by the judge, whether the plaintiff or the defendant shall prevail.

Being a fact-finding body, it is your duty to approach your task and perform your task unemotionally, objectively and dispassionately; sift and evaluate the testimony that has been presented to you, weigh that carefully; determine the facts, apply the law that is given to you, and then reach a proper verdict.

Now, in this case, I have granted certain prayers or requested instructions which have been asked by
291 counsel for the parties and as I go along, I shall read them to you.

They state the law in respect of the matters therein dealt with. There may be, and I dare say, will be repetition in what is contained in those prayers and what I shall say to you generally and where there is repetition, please understand it is not for the purpose of emphasis but that some repetition is almost inevitable in the court's general charge, and the reading of certain instruction if the Court's general charge is to be intelligible to you. You will consider, therefore, the instructions as a whole.

Being the judges of the facts, the first question is how you will determine those facts. In determining the facts in this case you are limited to the evidence in the case and to inferences logically and reasonably arising from the evidence in the case.

Now, the evidence in the case consists of the testimony which you have heard from the witnesses here, and from documents, pictures, which have been received in evidence and the stipulations of counsel which you may consider as facts.

There is nothing else before you. You are not to guess and you are not to speculate. You are not to conjecture.

But that doesn't mean that you are not permitted
292 to apply your experience in life.

It doesn't mean that you cannot use your common sense in weighing and evaluating the evidence but it does mean that you are not to guess or speculate.

Therefore, in finding the facts, you will limit yourselves to the evidence which is the testimony, pictures and documents and stipulations, and all inferences which are reasonably and logically deducible from the evidence.

Being the sole and exclusive judges of the facts, you are also the judges of the credibility of the witnesses. Now, that means that you are to determine the weight and credibility to be given to the testimony of each witness who appeared here before you. In determining credibility you will take into consideration the manner and the demeanor of the witness on the witness stand:

Whether the witness impressed you as a truth-telling individual or otherwise, whether the witness impressed you as having an accurate memory and recollection and whether the witness impressed you as correctly relating what the witness did know.

You will take into consideration the memory or lack of memory of any witness, his ability or lack of ability to see and express to you what he heard or saw through the medium of words, and also you may consider any
293 bias or prejudice, if any be manifested by any witness.

You may take into consideration the interest of any witness in the outcome of the case and likewise you may take into consideration any association or business relationship which may exist between any witness and any party to this cause.

All of this you may take into consideration in determining the credit and weight to be given to the testimony of any witness.

Now, you should not be influenced by sympathy in this case and you should not be influenced by the fact that one of the parties is an individual and the other is a corporation.

The jury should consider the issues before it in the same manner as if both the plaintiff and the defendant were individuals.

I shall comment on the evidence as I go along but in doing so, it is not my purpose to influence your judgment on the facts but solely for the purpose of assisting you in understanding what is not in dispute and what is in dispute, and in understanding the issues which you are called upon to determine and in an effort to crystallize in your mind those issues and bring them into focus.

If anything that I say to you is contrary to your
294 recollection of the facts, please bear in mind that what I say is not evidence and what the attorneys in this say is not evidence.

I have explained to you what the evidence is, and it is your recollection of the evidence which is to govern you in your deliberations.

Now, the party who asserts the affirmative of an issue must carry the burden of proving it. Such burden of proof is established by a fair preponderance of the evidence. It means that the testimony on behalf of the party carrying the burden of proof must have greater weight in your estimation than that opposed to it.

If you believe that the testimony on any essential point is evenly balanced then your finding on that point must be against the part carrying the burden of proof.

Of course, the plaintiff asserts the affirmative and the plaintiff, Mr. Mather, has the burden of establishing the essential elements of his claim by a preponderance of the evidence which might be, briefly stated, the greater weight of the evidence.

The defendant, the Woodner Company, asserts two affirmative defenses. One is assumption of the risk, and the other is contributory negligence.

What is meant by assumption of risk and contributory negligence will be explained later.

At this point, you are told that as to each affirmative defense asserted by the defendant, the defendant has the burden of proof. Otherwise, it, that is, the affirmative defense, is not made out.

Now, in the course of this charge, I shall use the expression, "proximate cause" and I am going to give you a definition of that term.

The proximate cause of an injury is that cause which in natural and continuous sequence, unbroken by any efficient intervening cause produces the injury and without which the result would not have occurred. It is the efficient cause, the one that necessarily sets in operation the factors that accomplish the injury.

It may operate directly or by putting intervening agencies in motion. Now, as I see it, there is no dispute on certain facts in this case which I shall now outline to you.

The defendant, the Woodner Company, was the general contractor constructing an apartment project. The Woodner company engaged the Colonial Company to do a certain part of the work which the Woodner company had undertaken.

The Woodner Company through its foreman told the Colonial Company through its foreman to remove certain wires from poles, which poles had been installed by the Woodner Company.

On February 20, 1950, Mr. Mather, the plaintiff, as an employee of the subcontractor, namely, the Colonial Company, was at work removing the wires when the incident occurred which is the subject of this litigation.

Now, that, as I said, that much, is not in dispute.

Now, this suit is what is commonly called a negligence action. Mr. Mather sues for damages and he is suing the Woodner Company, the general contractor, for injuries which he says he suffered as a result of negligence on the part of the Woodner Company.

Now, he asserts that the negligence consisted of undermining the pole by the removal of dirt around it and failing to warn him of the unsafe condition of the pole which condition he says was known to the company or which in the circumstances should have been known to the company.

He says that after he climbed to the top of the pole and had cut some of the wires, that the pole fell, injuring him, due to the negligence of the defendant company as charged.

Now, on the other hand, the Woodner Company denies any negligence on its part. Further, the Woodner Company says that if the plaintiff suffered injury they
297 resulted from the plaintiff's own negligence.

Moreover, the defendant, the Woodner Company, asserts two affirmative defenses. In effect, the company maintains that if it was negligence, still the plaintiff cannot recover because the company says that the plaintiff was himself contributorily negligent or assumed the risk of injury.

Now, I have used the word "negligence", since it is negligence that is charged by Mr. Mather against the Woodner Company. Also, the Woodner Company says Mr. Mather was himself negligent or contributorily negligent. So what is negligence?

Now, here is how the law defines negligence: Negligence is the doing of some act which a reasonably prudent person would not do or the failure to do something which a reasonably prudent person would do actuated by those considerations which ordinarily regulate the conduct of human affairs. It is the failure to use ordinary care in the management of one's person or property.

Now, negligence is not an absolute term but a relative one. By this we mean that in deciding whether there was negligence in a given case the conduct in question must be considered in the light of all the circumstances surrounding the occurrence as shown by the evidence.

298 This rule rests on the self-evident fact that a reasonably prudent person will react differently to

different circumstances. Those circumstances enter into and are a part of the conduct in question. An act of negligence under one set of circumstances may not be so under another.

Therefore, to arrive at a fair standard we ask what conduct might reasonably have been expected of a person of ordinary prudence under the same circumstances.

Our answer to that question gives us a criterion by which to determine whether or not the evidence before us proves negligence.

You will note that the person on whose conduct we set up as a standard is not the extraordinarily cautious individual nor the exceptionally skillful one, but a person of reasonable and ordinary prudence.

While exceptional skill is to be admired and encouraged, the law does not demand it as a general standard of conduct.

Ordinary care is that care which persons of ordinary prudence exercise in the management of their own affairs. Inasmuch as the amount of caution used by the ordinarily prudent person varies in direct proportion to the danger known to be involved in his undertaking, it follows that

in the exercise of ordinary care, the amount of caution
299 required will vary in accordance with the nature of the act and the surrounding circumstances.

To put the matter in another way: The amount of caution required by the law increases as does the danger that reasonably should be apprehended.

Now, what is meant by contributory negligence? Contributory negligence is negligence on the part of the person injured, which, combined in some degree with the negligence of another, helps in proximately causing the injury of which the person injured complains.

One who is guilty of contributory negligence may not recover from another for the injury suffered. Contributory negligence as it has been defined connotes negligence on the part of both the plaintiff and the defendant, combining to proximately cause the injury.

Not only is the plaintiff precluded from recovery if he is guilty of contributory negligence but the plaintiff may not recover if the injury was the proximate result of his sole negligence.

Now, ladies and gentlemen, the mere fact that an accident happened, considered alone, does not support an inference that some party, or any party, to this action was negligent. No presumption of negligence arises from the mere happening of the accident in this case.

300 On the contrary, the legal presumption is that both the plaintiff and the defendant exercise reasonable care. The burden is on the plaintiff to prove by the greater weight of the evidence that the defendant was negligent as he claims and that such negligence was the proximate cause of injury to him.

With respect to the claim of contributory negligence made by the defendant, the burden of proof is on the defendant to show such contributory negligence.

Now, ladies and gentlemen, what was the legal duty of the defendant, the Woodner Company, toward Mr. Mather with respect to that pole? The law says that it was the duty of the company to use reasonable care and caution in the installation of that pole and in its maintenance in order to make it reasonably safe for Mr. Mather to do his work.

The responsibility of the defendant for the pole is not an absolute responsibility; it is not that of an insurer. The duty of the defendant was to exercise the ordinary care and caution of a reasonably prudent person to keep the pole in a condition reasonably safe under all the circumstances in the case.

Now, in his complaint, Mr. Mather says that the Woodner Company did not meet the requirement of reasonable and caution but was negligent in undermining the
301 pole by removing dirt surrounding it and in failing to warn him of the dangerous condition so created after the company knew or in the exercise of reasonable care should have known of the existence of the condition?

Further, Mr. Mather says that such negligence was the proximate cause of the injuries he received.

Now, these are the essential allegations of Mr. Mather's complaint.

Now, these questions arise: Was dirt removed from around the pole? Was the pole undermined? What, exactly, was the condition of the pole in these respects? If you find that the pole was undermined by the removal of dirt, then did that condition prove to your mind a want of reasonable care and caution on the part of the Woodner company?

If you find by the weight of the evidence that it was through a want of reasonable care and caution on the part of the Woodner company that dirt was removed, resulting in the undermining of the pole and if you further find by the weight of the evidence that this want of care by the Woodner company was the proximate cause of plaintiff's fall from the pole, then the essential allegations of the plaintiff's complaint are established.

But there are further questions for your consideration.

If the pole was undermined by the removal of dirt
 302 did Mr. Mather know of it or if he did not know of it, was he careless in not knowing? Mr. Mather has the duty of exercising reasonable care and caution for his own safety. In the absence of appearances that cautioned him or would caution a reasonably prudent person to the contrary, Mr. Mather had a right to assume that the Woodner Company maintained the pole in a reasonably safe condition for the purpose and use for which it was erected.

If the pole was unsafe and the Woodner Company knew of it or if that condition was discoverable in the exercise of ordinary care by the company, then it was the duty of the company to warn Mr. Mather but if the condition was such as to be obvious or apparent to Mr. Mather upon the ordinary use of his own senses, then naturally there would not be a duty on the company to warn Mr. Mather of an obvious danger.

As I said, you have the questions:

Did Mr. Mather know of the condition of the pole? If he did not, ought he to have known about it in the circumstances?

Now, ladies and gentlemen, in this connection, you will recall that some pictures were thrown on the screen showing a view of part of the project at some time after the accident and showing a pole or log on the ground.

303 I say some time after the accident, because it is my recollection that no testimony indicated just when the pictures were taken. But all the witnesses indicated that the pole had fallen in one place and had been moved at least to some extent.

The pole in these pictures was lying on the ground, as you will recall. The pole Mr. Mather climbed was, according to the testimony, standing when he commenced his climb, and until he reached the top of it.

Conflicting claims have been made by counsel here as to how the pole looked or appeared at the time Mr. Mather reached it to begin his climb. Also, the testimony of the witnesses on this point varied. It is for you, members of the jury, to say from the evidence what was visible to Mr. Mather at the time he approached the standing pole to begin his climb, remembering that you are to judge by what the human eyes of Mr. Mather saw or could have seen by the use of reasonable care under the circumstances and that the eyes of the camera, or the lenses, as we call them, and the film on which the impressions are made, and developed are not necessarily the real test of what the human eyes would have or did see by the use of ordinary care.

Now, in this case, comment has also been made as to whether in the exercise of ordinary care for his own
304 safety the plaintiff should have taken hold of the pole and have undertaken to test it by shaking it.

In considering whether or not the plaintiff exercised

ordinary care you are to remember that you are to judge that under the circumstances existing at the time—the base of the pole, according to the testimony, was in the earth and not in concrete or anything of that kind; the opposite end of the pole was not attached to anything for steady-ing purposes.

Under these circumstances we may infer that the pole would give some under weight or pressure, even if it were under the earth, even if the base were in the earth six feet.

It is for the jury to say whether under all the circumstances the plaintiff exercised ordinary care or did not exercise ordinary care under the circumstances.

Now, with reference to the defense of assumption of risk which the defendant interposed, you are told that the doctrine presupposes some danger as applied to the facts in this case.

The danger of a pole falling: If you find that Mr. Mather knew of the unsafe condition of the pole or in the exercise of reasonable care and prudence on his part should have known of the danger and that in these circumstances he
 305 he assumed the risk of injury in climbing the pole,
 then the defense of assumption of risk is made out,
 and plaintiff is not entitled to recover in that event.

In other words, if a person assumes a risk he is not entitled to recover damages for injuries resulting therefrom even though otherwise he would be entitled to recover.

Now, although in this case the defendant puts forth the defense of assumption of risk, the plaintiff's position is that on his part, he exercised ordinary care and did not assume the risk of injury from a pole undermined by the defendant, and the burden of proof on the defense of assumption of the risk is as I have already said, on the defendant.

Now, another affirmative defense asserted by the defendant is contributory negligence. On this defense, also, the defendant has the burden of proof. If the evidence, when you take it all together, fairly shows that Mr.

Mather himself was negligent and that his negligence contributed to cause the injury then he cannot recover, even if you should be convinced that the company was negligent.

In order for Mr. Mather to recover damages, the case made out must be one in which the accident was due to the negligence of the Woodner Company and not due to any contributory negligence on the part of the plaintiff.

If either the defense of assumption of risk or defense of contributory negligence is made out by the defendant by the weight of the evidence, then the plaintiff cannot recover. Otherwise, the plaintiff may recover if he has established by the weight of the evidence, that is, the greater weight of the evidence, that his injuries proximately resulted from negligence on the part of the defendant as claimed by him.

And now I will give you certain prayers which have been requested by the attorney for the plaintiff.

The jury are instructed as a matter of law that if you find from a preponderance of the evidence, that the defendant was negligent and careless in grading around the pole so as to make the pole unsafe for the plaintiff to climb, and that this negligence caused the pole to fall, thereby injuring the plaintiff, then your verdict in this case must be for the plaintiff, unless the defendant sustains one or more of its affirmative defenses.

The jury are instructed as a matter of law that the defendant was required to use reasonable and ordinary care to install and maintain the pole a depth in the ground to make it reasonably safe for the plaintiff to climb and if you find from the evidence that the defendant was negligent and careless in installing the pole or maintaining the pole and that this negligence was the proximate cause of the plaintiff's injuries, then your verdict in this case must be for the plaintiff, unless the defendant sustains one or more of its affirmative defenses, in which case your verdict must be for the defendant.

The jury are instructed as a matter of law that the defendant, Jonathan Woodner Corporation, was under a duty to provide the plaintiff with a reasonably safe place to work under the circumstances and if you find from the evidence that the defendant was negligent and careless in grading around the pole so as to make it unsafe and failed to warn the plaintiff of this unsafe condition and that this failure caused the plaintiff to be injured, then you are instructed that your verdict in this case must be for the plaintiff unless the defendant sustains one or more of its affirmative defenses, in which case your verdict must be for the defendant.

The jury are instructed that if you find under these instructions for the plaintiff, then in fixing the amount of the award that you will make in that event for the plaintiff you must take into consideration the injuries sustained by the plaintiff and award him such sums as will reasonably and fairly compensate him for his injuries and for the pain, the physical discomfort, suffering and mental anguish sustained by him and for such pain, discomfort, if any, as

308 he is reasonably certain to suffer in the future from this accident, that is, as you may find he is reasonably certain to suffer, and you should also compensate him for any loss of earnings sustained by reason of such accident and any loss of earnings which you may find he is reasonably certain to suffer in the future from this accident, and if you find that his earning power has been limited or diminished by the injury in question, then you should consider that fact also in fixing the plaintiff's damages.

And in case you find for the plaintiff you should compensate him for the reasonable value of the expenses he has incurred by reason of his injuries for hospital, medical, surgical, X-ray, nursing treatment and medicines in such amount as he may reasonably, has reasonably incurred.

The jury are further instructed that in fixing the amount of award for the plaintiff for his injuries that, if you find from the evidence that these injuries are reasonably cer-

tain to be permanent, that you are to make an allowance in your verdict for such permanent injuries in the event you find for the plaintiff.

At the request of the attorney for the defendant, I give you this instruction.

The jury are instructed, as a matter of law, that the usual and customary practices of the linemen in climbing and cutting wires on an electric pole are evidence of
 309 what the plaintiff ought to have done to protect himself from injury. The jury are instructed as a matter of law that the plaintiff in his testimony has acknowledged that the following is a fair statement of one of the rules of safety to be followed in performing the task on which he was engaged at the time of the injury:

Before climbing poles, first assure yourself that the pole is strong enough to safely sustain your weight; and you are instructed that if you find that the plaintiff failed to follow this rule of safety and that this failure was a contributing cause of injury to the plaintiff, then your verdict must be for the defendant.

In connection, however, with this instruction, the term concerning assuring yourself of the safety of the pole means simply the exercise of ordinary care and caution which the ordinarily prudent man would exercise under the same circumstances.

It does not mean absolute assurance.

Now, ladies and gentlemen, there has been something said in this case about a safety rule to the effect that on pole replacement work no pole is to be climbed to cut wires and cables without guying or bracing the pole.

Now, the plaintiff was not replacing a pole, but according to the testimony, was cutting wires from a pole
 310 which the defendant was to remove. In this case, the evidence does not disclose that either the plaintiff or the defendant directed or requested the guying or bracing of the pole.

Now, as I have already said, you are to consider the instructions which have been given to you in their entirety.

You are not to single out some particular instruction and accentuate it and overlook others, but you are to consider them all together.

Now, you are instructed that if the judge has said or done anything which suggested to you that she is inclined to favor the claims or position of either party, you will not permit yourselves to be influenced by any such suggestion.

I have not expressed, nor intended to express, nor have I intimated nor intended to intimate any opinion as to what the facts are or are not established, except with respect to those facts which are undisputed in the case.

If any expression of mine has seemed to indicate an opinion relating to these disputed matters, I instruct you to disregard it.

When you return to the courtroom, your verdict will be either for the plaintiff or for the defendant, and if your verdict is for the plaintiff, you will state the amount of the verdict in a single sum.

When you go to the jury room, you will there elect
311 your foreman and your foreman will preside at your sessions and give each of you an opportunity to express your views and upon your return to the courtroom the foreman will state your verdict, but you may be asked individually to state the verdict, in which case each of you should be prepared to do so.

Do you want to come to the bench?

(Counsel approached the bench, and the following proceedings were had away from the hearing of the jury:)

Mr. Melrod: I am completely satisfied with your Honor's charge. I think it was fair.

Mr. Jackson: With what your Honor has expressed as to the law, your Honor has done a very fair job with it.

I do have these comments, which I think are repetitious. With respect to the prayers, I need not develop on each one of them the denial of the plaintiff's prayers. I think that this man, as a lineman, was obliged—I mean I think the jury should be told he had a special skill and that he was

regarded as having special skill of a lineman, so that he was exercising those special precautions for himself that a lineman might be obliged to do, and that would include an affirmative duty to inspect; even dig around the pole to ascertain its safety.

I reiterate what I said about the duty of a contractor to maintain a safe place to work.

I don't believe it is the contractor's duty to maintain a safe place to work in the same sense that we ordinarily think of a safe place to work. I am afraid that is the effect of your Honor's charge.

The Court: I have tried to add each time, "under the circumstances."

(The following proceedings were held in open court before the jury:)

The Court: Ladies and gentlemen, you may retire to the jury room and there give to this matter conscientious and careful consideration.

(Whereupon, at 2:30 o'clock, p. m., the jury retired for deliberation.)

(Whereupon, at 3:33 o'clock, p. m., the jury returned to the courtroom.)

The Clerk: Madam Foreman, has the jury agreed on a verdict?

The Foreman: Yes, we have.

The Clerk: Do you find for the plaintiff or for the defendant?

The Foreman: The verdict is for the plaintiff.

The Clerk: In what amount?

The Foreman: \$20,000.

313 The Clerk: Members of the jury, your forewoman says you find for the plaintiff in the sum of \$20,000. Is this your verdict, so say you, each and all?

The Jury: Yes.

* * * * *

Sept. 5x #3
IDT

ASSOCIATED INDEMNITY CORPORATION

SAN FRANCISCO

DECLARATIONS

No. C-457142 P

ITEM 1		NAME OF THIS EMPLOYER	
		JONATHAN WOODNER COMPANY	
P. O. ADDRESS			
1200 18TH STREET, N.W. WASHINGTON, D.C.		CORPORATION	
FOR THE PURPOSE OF SERVING NOTICE, AS IN THE POLICY PROVIDED, THIS EMPLOYER AGREES THAT THIS ADDRESS MAY BE CONSIDERED AS BOTH THE RESIDENCE AND BUSINESS ADDRESS OF THIS EMPLOYER OR ANY REPRESENTATIVE UPON WHOM NOTICE MAY BE SERVED		INDIVIDUAL, CO-PARTNERSHIP, CORPORATION OR ESTATE?	
ITEM 2. THE PERIOD DURING WHICH THE POLICY SHALL REMAIN IN FORCE, UNLESS CANCELED AS IN THE POLICY PROVIDED (HEREIN CALLED THE POLICY PERIOD), SHALL BE FROM 11-12-49 TO 11-12-50			
AT TWELVE AND ONE MINUTE O'CLOCK A. M., STANDARD TIME, AS TO EACH OF SAID DATES AT THE PLACE WHERE ANY OPERATION COVERED HEREBY IS CONDUCTED, AS RESPECTS THAT OPERATION, OR AT THE PLACE WHERE ANY INJURY COVERED HEREBY IS SUSTAINED, AS RESPECTS THAT INJURY.			
ITEM 3. LOCATIONS OF ALL FACTORIES, SHOPS, YARDS, BUILDINGS, PREMISES OR OTHER WORKPLACES OF THIS EMPLOYER, BY TOWN OR CITY, WITH STREET AND NUMBER			
23RD AND CONGRESS ST., S.E., AND 63RD AND CLAY ST. N.E. WASHINGTON, D.C. AND SEE SCHEDULES			
ALL BUSINESS OPERATIONS, INCLUDING THE OPERATIVE MANAGEMENT AND SUPERINTENDENCE THEREOF, CONDUCTED AT OR FROM THE LOCATIONS AND PREMISES DEFINED ABOVE AS DECLARED IN EACH INSTANCE BY A DISCLOSURE OF ESTIMATED REMUNERATION OF EMPLOYEES UNDER SUCH OF THE FOLLOWING DIVISIONS AS ARE UNDERTAKEN BY THIS EMPLOYER: 1. ALL INDUSTRIAL OPERATIONS UPON THE PREMISES. 2. ALL OFFICE FORCES. 3. ALL REPAIRS OR ALTERATIONS TO PREMISES. 4. SPECIALLY RATED OPERATIONS ON THE PREMISES. 5. OPERATIONS NOT ON THE PREMISES.			
CLASSIFICATION OF OPERATIONS NOTE: IF MORE THAN ONE CLASSIFICATION INDICATE EACH OTHER BY (b), (c), (d), ETC.		ESTIMATED TOTAL ANNUAL REMUNERATION	RATE PER \$100 OF REMUNERATION
1 (a)			
MARYLAND SCHEDULE #1, #2			521.60
VIRGINIA SCHEDULE #3, #4			27.42
D.C. SCHEDULE #5, #6			17,586.74
DELAWARE SCHEDULE #7			.72
2 (a) CLERICAL OFFICE EMPLOYEES N. O. C.		8810	
3 (a) SALESMEN, COLLECTORS OR MESSENGERS - OUTSIDE - WHO DO NOT DELIVER MERCHANDISE		8742	
(b) DRIVERS AND THEIR HELPERS N. O. C. - INCLUDING STABLEMEN - IF NOT SPECIFICALLY INCLUDED IN DIVISION 1		7205	
(c) CHAUFFEURS AND THEIR HELPERS N. O. C. - COMMERCIAL - INCLUDING GARAGE EMPLOYEES - IF NOT SPECIFICALLY INCLUDED IN DIVISION 1		7380	
MINIMUM PREMIUM \$ 63.00 D.C.		DEPOSIT PREMIUM \$ 4500.	TOTAL 18,136.48
ITEM 4. THE FOREGOING ENUMERATION AND DESCRIPTION OF EMPLOYEES INCLUDE ALL PERSONS EMPLOYED IN THE SERVICE OF THIS EMPLOYER IN CONNECTION WITH THE BUSINESS OPERATIONS ABOVE DESCRIBED TO WHOM REMUNERATION OF ANY NATURE IN CONSIDERATION OF SERVICE IS PAID, ALLOWED OR DUE TOGETHER WITH AN ESTIMATE FOR THE POLICY PERIOD OF ALL SUCH REMUNERATION. THIS ENUMERATION AND DESCRIPTION WITH THE ESTIMATED REMUNERATION SHALL ALSO INCLUDE THE PRESIDENT, ANY VICE-PRESIDENT, SECRETARY OR TREASURER OF THIS EMPLOYER IF A CORPORATION IF ACTUALLY PERFORMING SUCH DUTIES AS ARE ORDINARILY UNDERTAKEN BY A SUPERINTENDENT, FOREMAN OR WORKMAN, BUT ANY SUCH DESIGNATED OFFICER NOT SO ENGAGED SHALL NOT BE INCLUDED IN SUCH ENUMERATION, DESCRIPTION OR ESTIMATED REMUNERATION. THE FOREGOING ESTIMATES OF REMUNERATION ARE OFFERED FOR THE PURPOSE OF COMPUTING THE ADVANCE PREMIUM. THE COMPANY SHALL BE PERMITTED TO EXAMINE THE BOOKS OF THIS EMPLOYER AT ANY TIME DURING THE POLICY PERIOD AND ANY EXTENSION THEREOF AND WITHIN ONE YEAR AFTER ITS FINAL TERMINATION SO FAR AS THEY RELATE TO THE REMUNERATION EARNED BY ANY EMPLOYEES OF THIS EMPLOYER WHILE THE POLICY WAS IN FORCE.			
ITEM 5. THIS EMPLOYER IS CONDUCTING NO OTHER BUSINESS OPERATIONS AT THIS OR ANY OTHER LOCATION NOT HEREIN DISCLOSED - EXCEPT AS HEREIN STATED.			
ITEM 6. NO SIMILAR INSURANCE HAS BEEN CANCELED BY ANY INSURANCE CARRIER DURING THE PAST YEAR - EXCEPT AS HEREIN STATED.			
DATE OF ISSUE 11-17-49 MC		COUNTERSIGNATURE OF AUTHORIZED AGENT BY BS Nussbaum Jr. AUTHORIZED	

PAGE ONE

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from the original

WORKMEN'S COMPENSATION ENDORSEMENT—MARYLAND

For Attachment to Standard Workmen's Compensation and Employers' Liability Policy When Insurance Is Afforded Under the Workmen's Compensation Act of Maryland to Complete the Contract as Provided in the Policy and to Amend the Policy

1. The obligations of Paragraph One (a) of the Policy to which this endorsement is attached include such Workmen's Compensation Laws as are herein cited and described and none other:

Article 101—Workmen's Compensation, Flack's Annotated Code of Maryland (1939 Edition), and all laws amendatory thereof which may be or become effective while this Policy is in force.

2. As respects any claim for benefits under such Workmen's Compensation Law made direct against the Company as provided in the Policy by any employee, or by his dependents in the event of death, or by the State Industrial Accident Commission of Maryland for the benefit of the person entitled thereto, this Policy shall cover all employees of this Employer legally employed. This paragraph is added to the Policy solely for the protection of employees and their dependents, but shall not be considered as a part of the Policy if any question arises between this Employer and the Company as to the nature or extent of the obligations imposed upon either of them by this contract of insurance.

3. Condition C of the Policy is replaced by the following: The Company shall be permitted, at all reasonable times during the Policy Period, to inspect the work places, plants, works, machinery and appliances covered by the Policy and shall be permitted, at all reasonable times during the Policy Period and any extension thereof and within three years after the final termination of the Policy, to examine this Employer's books, vouchers, contracts, documents and records of any and every kind which show or tend to show or verify the remuneration or other basis in respect to which premium is payable.

4. This Employer, upon the acceptance of this Policy, agrees that if he is a principal contractor and contracts with any other person as sub-contractor for the execution by or under the sub-contractor of the whole or any part of the work undertaken by the principal contractor under the conditions and obligations set forth in Section 63 of such Workmen's Compensation Law, the remuneration of all employees of any such sub-contractor shall be included in the return of remuneration upon which the premium for this Policy is computed, and such remuneration so reported shall in all respects be governed by the same terms, conditions and requirements of the Policy as the remuneration of the direct employees of this Employer.

5. If this Employer is a corporation, the entire remuneration of the President, any Vice-President, Secretary, Treasurer and other executive officers elected or appointed in accordance with the charter and by-laws of such corporation shall be disclosed and premium shall be paid thereon, subject to a minimum individual remuneration of \$30 per week, if the actual remuneration is less than such amount, and to a maximum individual remuneration of \$100 per week, if the actual remuneration is greater than such amount. The remuneration so determined of each executive shall be assigned without division to the classification which is applicable to the actual operations in which such executive officer is primarily engaged, provided the remuneration so determined of each executive officer who performs such duties as are ordinarily undertaken by a superintendent, foreman or workman, or whose duties include direct charge of the actual performance of any operations of this Employer, shall be assigned without division to the highest rated classification which is applicable to any such duties undertaken by such executive officer for any part of his time.

6. If the premium as determined in accordance with the provisions of the Policy is less than \$400, there shall be added thereto the applicable Loss and Expense Constants expressed in the Declarations, unless such addition shall increase the premium to an amount in excess of \$400, in which event only such portions of the Loss and Expense Constants shall be added as will bring the amount of the premium to \$400. Inclusion of the Loss and Expense Constants or any portions thereof in the Estimated Advance Premium is subject to final adjustment upon audit. In the event of cancellation by the Company, pro rata portions of the Loss and Expense Constants apply subject otherwise to the provisions hereof. In the event of cancellation by the Employer, the short rate portion of the Loss Constant and the entire Expense Constant apply subject otherwise to the provisions hereof. The Minimum Premium of the Policy includes the Loss and Expense Constants. If the Policy affords insurance in two or more states, the provisions of this paragraph respecting the Loss Constant apply to the applicable Loss Constant expressed in the Declarations for the State of Maryland on the basis of the premium for operations in that state, and the provisions of this paragraph respecting the Expense Constant apply on the basis of the total premium for the Policy.

(Continued on the Reverse Side)

THIS ENDORSEMENT FORMS A PART OF POLICY NUMBER		ISSUED TO	
C-457142 P		JONATHAN WOODNER COMPANY	
AND IS EFFECTIVE FROM		DATE OF ISSUE	COUNTERSIGNATURE OF AUTHORIZED AGENT
11-12-49		11-17-49 MC	
AT 12:01 A. M. STANDARD TIME			

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WORKMEN'S COMPENSATION ENDORSEMENT—DISTRICT OF COLUMBIA

For Attachment to Standard Workmen's Compensation and Employers' Liability Policy When Insurance Is Afforded Under the Workmen's Compensation Act of District of Columbia to Complete the Contract as Provided in the Policy and to Amend the Policy

1. The obligations of Paragraph One (a) of the Policy include the

District of Columbia Workmen's Compensation Act, being Public Act No. 419 of the 70th Congress, Approved May 17, 1928, and the applicable provisions of the Longshoremen's and Harbor Workers' Compensation Act, being Public Act No. 803 of the 69th Congress, and all laws amendatory of either of said Acts or supplementary thereof which may be or become effective while this Policy is in force.

2. The Company will carry out the provisions of Section 35 of the Longshoremen's and Harbor Workers' Compensation Act, made applicable by said Public Act No. 419 of the 70th Congress. Insolvency or bankruptcy of the Employer and/or discharge therein shall not relieve the Company from payment of compensation and other benefits lawfully due for disability or death sustained by an employee during the life of the Policy.

3. The Company agrees to abide by all the provisions of said District of Columbia Workmen's Compensation Act and all lawful rules, regulations, orders, and decisions of the Federal Security Agency, Bureau of Employees' Compensation, and of the Deputy Commissioner for the District of Columbia having jurisdiction, unless and until set aside, modified, or reversed by a court having jurisdiction of the parties and the subject matter.

4. This endorsement shall not be canceled prior to the date specified in this Policy for its expiration until at least 30 days have elapsed after a notice of cancellation has been sent to the Deputy Commissioner for the District of Columbia and to this Employer.

5. Reference to the law of any state in Conditions B and D of this policy are hereby declared to include, for the purposes of this endorsement only, the provisions of the District of Columbia Workmen's Compensation Act.

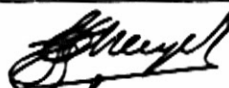
6. If this Employer is a contractor the subject of whose contract includes operations covered by this policy and he shall sub-contract all or any part of such contract to one or more sub-contractors, the remuneration of all the direct employees of all such sub-contractors shall be included in the return of remuneration under the provisions of this Policy upon which premium is computed. Such remuneration so reported shall be considered the remuneration of employees of this Employer and shall in all instances be governed by the same terms, conditions, requirements, and obligations of the Policy as the remuneration of the direct employees of this Employer. The requirements of this paragraph shall not apply as respects any such sub-contractor who has secured compensation for his direct employees as required by the District of Columbia Workmen's Compensation Act, but this Employer shall not claim the benefit of this exemption unless and until he shall satisfy the Company by certificate or otherwise that any such sub-contractor has legally secured the payment of compensation to his own direct employees and then only respecting any sub-contractor who has furnished such proof.

7. If this Employer is a corporation, the entire remuneration of the President, any Vice-President, Secretary, Treasurer, and other executive officers elected or appointed in accordance with the charter and by-laws of such corporation shall be disclosed and premium shall be paid thereon, subject to a minimum individual remuneration of \$30 per week, if the actual remuneration is less than such amount, and to a maximum individual remuneration of \$100 per week, if the actual remuneration is greater than such amount. The remuneration so determined of each executive shall be assigned without division to the classification which is applicable to the actual operations in which such executive officer is primarily engaged, provided the remuneration so determined of each executive officer who performs such duties as are ordinarily undertaken by a superintendent, foreman, or workman, or whose duties include direct charge of the actual performance of any operations of this Employer, shall be assigned without division to the highest rated classification which is applicable to any such duties undertaken by such executive officer for any part of his time.

8. If the premium as determined in accordance with the provisions of the Policy is less than \$300, there shall be added thereto an Expense Constant of \$10, unless such addition shall increase the premium to an amount in excess of \$300, in which event only such part of the Expense Constant shall be added as will bring the amount of the premium up to \$300. Inclusion of the Expense Constant or any part thereof in the Estimated Advance Premium is subject to final adjustment upon audit, all in accordance with the provisions hereof. The Minimum Premium of the Policy includes the Expense Constant.

9. This Policy is issued by the Company and is accepted by this Employer with the agreement that, subject to any required approval of an official or organization so authorized in the District of Columbia, the rates of premium are subject to change, if during the term of this policy any amendments affecting the benefits provided by the above cited Workmen's Compensation Law become effective, such change, if any, to be expressed by an endorsement naming the effective date thereof.

ASSOCIATED INDEMNITY CORPORATION



PRESIDENT

LIMITATION OF PARAGRAPH ONE (b) (For Workmen's Compensation Policies)

It is agreed that the obligations of the Company as expressed in Paragraph One (b) of this Policy as well as all parts of the Policy having reference thereto shall be limited to \$25,000 for all claims arising out of bodily injuries or death from any one accident.

THIS ENDORSEMENT FORMS
A PART OF POLICY NUMBER

ISSUED TO

C-457142 P

JONATHAN WOODNER COMPANY

ASSOCIATED INDEMNITY CORPORATION

AND IS EFFECTIVE FROM

DATE OF ISSUE

11-12-49

11-17-49 MC

AT 12:01 A. M. STANDARD TIME

WASHINGTON INSURANCE AGENCY, INC.

BY  AUTHORIZED

PRESIDENT

8036-AIC-7-48

AVAILABLE

und volume

BRIEF FOR APPELLANT

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA *United States Court of Appeals*
CIRCUIT *For the*
District of Columbia Circuit

No. 11,624 **FILED JAN 30 1953**

Joseph W. Stewart

CLERK

JONATHAN WOODNER COMPANY, a corporation, *Appellant*

VS.

ERNEST W. MATHER, *Appellee*

Appeal From the United States District Court for the
District of Columbia

LOUIS M. DENIT
THOMAS S. JACKSON
MARTIN R. FAIN
P. BAXTER DAVIS

BRANDENBURG & BRANDENBURG
Of Counsel

QUESTIONS PRESENTED

1. Where an employee of a subcontractor suffers an accidental injury on a construction project in progress in Maryland; and where the principal contractor has never had any contact with the injured employee except in that State; and where under the Workmen's Compensation Act of that State, the principal contractor is deemed to be the statutory employer of all workmen on the job and is, therefore, free from liability in an action for common-law damages; and where the Maryland statute expressly provides that a non-resident employee may have workmen's compensation either under the laws of Maryland or under the laws of the place where he was employed, *but in either event his right to workmen's compensation shall be his exclusive remedy*, may the principal contractor be held liable in an action for negligence in the District of Columbia at the suit of such subcontractor's employee, even if the plaintiff's contract of employment (with the subcontractor) was originally made in the District of Columbia; and does failure to apply the Maryland law deprive the defendant of its constitutional right to due process of law, and to application of the Full Faith and Credit Clause of the Constitution?

2. Whether, if the situs of the plaintiff's employment was the District of Columbia, under the Workmen's Compensation Laws of the District of Columbia, the plaintiff is entitled to recover in an action for negligence against the defendant, where the defendant is the principal contractor on a construction project, and where the plaintiff is an employee of a subcontractor.

3. Whether the trial court, as an issue subsidiary to that in the foregoing questions, should have submitted to the jury a determination of the situs of the plaintiff's employment, where the evidence was in conflict with respect thereto.

4. Whether, at the request of counsel for the defendant construction contractor, the jury should have been expressly instructed that the general contractor on a construction job does not have the duty, as towards workmen on the job, of keeping the premises where they are employed in a safe condition so far as its safety depends upon the due performance of that work by them and by their fellow workmen, and has no duty to warn workmen on the job of hazards and dangers inherent in the work.

5. Whether the employee of an electrical subcontractor on a construction project, who himself is an experienced lineman, is guilty of contributory negligence, as a matter of law, (or as a matter of law assumed the risk of the injury he suffered) while engaged in removing wires for a temporary electric pole where he failed to inspect and examine the pole to assure himself that the same was safe to climb, and failed to brace or support the pole, and failed to remove the wires at the far ends so that it would not be necessary to climb the pole, and particularly where it was as apparent to him as it was to the defendant that grading operations in the immediate area of the pole may have weakened the pole's support.

6. Whether, if the plaintiff is not guilty of negligence as a matter of law, or did not as a matter of law assume the risk of the accident in question, the court should have instructed the jury that the plaintiff, being himself an experienced lineman, and being then engaged in the work of a lineman, is to be held to the standard of conduct of an experienced lineman and not merely to the standard of conduct of the "reasonably prudent and ordinary man."

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,624

JONATHAN WOODNER COMPANY, a corporation, *Appellant*

v.

ERNEST W. MATHER, *Appellee*

Appeal From the United States District Court for the
District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a judgment entered June 16, 1952, upon a verdict returned the same day, for the recovery of Twenty Thousand Dollars (\$20,000.00) in the United States District Court for the District of Columbia. This Court has jurisdiction of this appeal under the provisions of Title 28, section 1291, of the United States Code.

STATEMENT OF THE CASE

The parties to this appeal will be described as they appeared in the court below. On February 20, 1950, the plaintiff was engaged in work as an employee of the Colonial Electric Company, a subcontractor (J. App. 57) upon a large apartment construction project (J. App. 57) in Prince Georges County, Maryland, known as "University Hills." (J. App. 9, 20) The defendant, Jonathan W. Woodner Company, was the principal contractor. (J. App. 20, 57) In the morning of that day, one of the defendant's foreman (J. App. 11, 57) directed the foreman of Colonial Electric Company to remove wires from a temporary electric pole so that the pole could be taken down so that it would be out of the way of a crew who were about to pave a sidewalk. (J. App. 15) The defendant's foreman gave no instruction's as to how the job was to be done. (J. App. 41, 61) The wires were affixed to the pole near the top and ran in four directions to several buildings nearby, two on the same side of the street as the pole, and two on the opposite side. (J. App. 12, 27, 38) He had originally installed the wires himself. (J. App. 13, 18) The foreman of the Colonial Electric Company directed the plaintiff and one helper to perform the job. (J. App. 11) The plaintiff, who had graduated (J. App. 23) to the trade of electrician from considerable previous experience as a lineman (J. App. 10, 12, 18, 22, 24), which is a special trade (J. App. 19) procured his climbing apparatus and proceeded forthwith to mount the pole which was pointed out to him by the defendant's foreman. He climbed to the top. (J. App. 13) During his climb he did not notice anything unusual about the steadiness of the pole. (J. App. 17) He made no special examination of the pole. (J. App. 14) Had he looked carefully, he would have seen a circle of mud on the pole several feet above the ground. (J. App. 43-4, 46, 63, 84, 75) He did not attempt to shake it. (J. App. 18) His helper went off to a nearby shed to throw the electric switch. (J. App. 16, 48) He saw that grading operations had been

undertaken in the area. (J. App. 29) He saw the roughness of the ground, and he had seen the bulldozers working. (J. App. 31, 62) He knew that it was the job of a lineman to inspect a pole and to know when a pole was safe to climb (J. App. 26); and he knew it was a customary practice of linemen to make sure that a pole was safe to climb before climbing it, (J. App. 19, 61) and he knew that it was also a customary safety practice of linemen to be sure that a pole was braced or guyed before climbing it. (J. App. 19) He knew that a common danger involved in climbing such poles is that the pole might fall. (J. App. 26) He did not brace or guy the pole. (J. App. 26) He could have cut the wires at the other ends, where they were attached to the buildings, but he did not. (J. App. 50, 55) He could have had another workman hold a rope taut to brace the pole, but he did not. (J. App. 17) When he reached the top, some twenty-eight feet in the air, (J. App. 12, 39) he placed one hand on top of the pole and with the other holding snippers he proceeded quickly to cut the wires. (J. App. 29, 48) When he had cut the last of the wires the pole began to fall. (J. App. 13, 48) Before he had a chance to dismount, the pole toppled over with him and he was injured. (J. App. 14, 48)

The pole was originally securely set into the ground four or four and a half feet. (J. App. 12, 18, 35, 66) After it fell, witnesses testified that fresh soil was clinging to the bottom of the pole for a distance of approximately eight inches, (J. App. 39, 59) indicating to them that at the time the plaintiff climbed it the pole was embedded in the soil to approximately that distance. Inasmuch as the defendant had used bulldozers in the area to perform grading operations, the plaintiff contended, and the jury must have found, that such grading operations had removed soil from around the pole to a depth equal to a distance between the original depth and eight inches. This the trial judge held to be negligence, a violation of a duty, she held, of defendant to maintain for plaintiff a "safe place to work."

The defendant, being engaged in construction projects in various states, had procured a policy of workmen's compensation insurance covering its operations in such states. (J. App. 121-3) By the express terms of the endorsement to that policy relating to its Maryland operations, employees of subcontractors are covered, and the plaintiff would have the right to workmen's compensation under the laws of that state upon the policy in question. (J. App. 122) The endorsement for the District of Columbia differs only in that the defendant may relieve itself from the payment of premiums by satisfying the insurance company "by certificate or otherwise" that a subcontractor has "legally" secured the payment of compensation to his own direct employees. (J. App. 123) The plaintiff's immediate employer, Colonial Electric Company, also had workmen's compensation insurance for Maryland, as well as the District of Columbia. (J. App. 80)

The plaintiff testified that he was originally employed by Colonial Electric Company in the District of Columbia. (J. App. 9) He did not say at what place in the District of Columbia he was employed. He did not describe the circumstances of his employment, that is, whether he went to an office of Colonial Electric Company or whether he was employed on a job, although he said he "reported to a job in the District. (J. App. 9) The president of Colonial Electric Company (he and his wife were the sole owners of the corporation) testified that while at the time of the plaintiff's first employment in June of 1949, he technically had an office in the District of Columbia, which he described as his "principal office", it was not actually occupied by him or any employee of his company and was no more than a mail box on the door, that the address was used for the purpose of his company's being licensed to do business in the District of Columbia. He further testified that all of his business operations and all of his books and records were at his home in Takoma Park, in Prince Georges County, Maryland. He stated definitely that while he could

not remember where in fact the plaintiff was employed, whether at his home or one a job, it was at one or the other and not at the "District of Columbia office." (J. App. 68-70, 89, 92)

At the conclusion of the evidence the defendant moved for a directed verdict, which the court overruled. The case went to the jury and resulted in a verdict for the plaintiff.

STATUTES INVOLVED

Article 101, section 14, Annotated Code of Maryland, 1951 (An. Code 1939, sec. 14).

Every employer subject to the provisions of this Article, shall pay or provide as required herein compensation according to the schedules of this Article for the disability or death of his employee resulting from an accidental personal injury sustained by the employee arising out of and in the course of his employment without regard to fault as a cause of such injury, * * *.

The liability prescribed by the last preceding paragraph shall be exclusive, * * *.

Article 101, section 63, Annotated Code of Maryland, 1951 (An. Code 1939, section 77).

When any person as a principal contractor, undertakes to execute any work which is a part of his trade, business or occupation which he has contracted to perform and contracts with any other person as subcontractor, for the execution by or under the subcontractor, of the whole or any part of the work undertaken by the principal contractor, the principal contractor shall be liable to pay to any workman employed in the execution of the work any compensation under this Article which he would have been liable to pay if that workman had been immediately employed by him; and where compensation is claimed from or proceedings are taken against the principal contractor, then, in the application of this Article, reference to the principal contractor shall be substituted for reference

to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the workman under the employer by whom he is immediately employed.

Where the principal contractor is liable to pay compensation under this section, he shall be entitled to indemnity from any employer, who would have been liable to pay compensation to the employee independently of this section, and shall have a cause of action therefor against such employer.

Nothing in this section shall be construed as preventing a workman from recovering compensation under this Article from the subcontractor instead of from the contractor.

Whenever an employee of a sub-contractor files a claim under this Article against the principal contractor, the principal contractor shall have the right to join the sub-contractor or any intermediate contractors as defendant or co-defendant in the case.

Article 101, section 68, Annotated Code of Maryland, 1951 (An. Code 1939, section 80).

Definitions as used in this Article:

* * * * *

(3) 'Employee' means a person who is engaged in an extra-hazardous employment in the service of an employer, * * *.

An employee and his employer who are not residents of this State and whose contract of hire is entered into in another State shall be exempted from the provisions of this Article which such employee is temporarily or intermittently within this State doing work for such non-resident employer, if such employer has furnished workmen's compensation insurance coverage under the workmen's compensation or similar laws of such other State, so as to cover such employee's employment while in this State; provided, the extra-territorial provisions of this Article are recognized in such State and provided employers and employees who are covered in this State are likewise exempted from the application

of the workmen's compensation or similar laws of such other State. The benefits under the Workmen's Compensation Act or similar laws of such other State shall be the exclusive remedy against such employer for any injury, whether resulting in death or not, received by such employee while working for such employer in this State.

* * * * *

United States Code, Title 33, section 904:

Liability for compensation. (a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this chapter. In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment.

(b) Compensation shall be payable irrespective of fault as a cause for the injury. (Mar. 4, 1927, c. 509, § 4, 44 Stat. 1426.)

United States Code, Title 33, section 905:

Exclusiveness of liability. The liability of an employer prescribed in section 904 of this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representatives, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee.

United States Code, Title 33, section 933:

Compensation for injuries where third persons are liable. (a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the Secretary may provide, to receive such compensation or to recover damages against such third person.

* * * * *

STATEMENT OF POINTS ON APPEAL

1. The Court erred in failing to direct a verdict for the defendant at the close of the plaintiff's evidence and at the close of all the evidence.
2. The Court erred in failing to hold that the law of the State of Maryland governed the liabilities of the parties.
3. The Court erred in failing to hold that under the law of Maryland the plaintiff cannot maintain this action against the defendant as his statutory employer.
4. The Court erred in failing to give full faith and credit, as required by Article IV, Section 1, of the Constitution of the United States, to the provisions of Article 101, Section 68-3 of the Annotated Code of Maryland (1951).
5. The Court erred in failing to apply the public policy of the State of Maryland, where the injury occurred, as strongly expressed in its statutes and the opinions of its highest court.
6. By permitting the plaintiff to maintain this action, notwithstanding the provisions of Article 101, Section 68-3 of the Annotated Code of Maryland (1951), the Court de-

prived this defendant of its property without due process of law, by protection from which is extended by the Fifth and Fourteenth Amendments to the Constitution of the United States.

7. The Court erred in holding that the employee of a subcontractor may maintain an action for damages for negligence against the general contractor under the Workmen's Compensation Law of the District of Columbia, Title 33, Sections 901-950, of the United States Code, and Sections 36-501, 502 of the District of Columbia Code (1951).

8. By permitting the plaintiff to maintain this action, notwithstanding the provisions of Title 33 Sections 904 and 905 of the United States Code, the Court deprived this defendant of due process of law, protection from which is extended by the Fifth and Fourteenth Amendments to the Constitution of the United States.

9. The Court erred in failing to hold that the plaintiff was guilty of contributory negligence as a matter of law.

10. The Court erred in failing to hold that the plaintiff assumed the risk of the accident which resulted in the injury for which this action was brought.

11. The Court erred in failing to instruct the jury that the plaintiff, as a lineman, was held as a matter of law to the standard of care of a lineman, and not that of a person not so experienced.

12. The Court erred in failing to instruct the jury that the plaintiff, as an experienced lineman, was under an affirmative duty to make such actual inspection of the pole on which he was injured as would assure him to a reasonable degree that it might be safely climbed.

13. The Court erred in failing to instruct the jury that in the absence of any evidence that the defendant was known by the plaintiff to have assumed or undertaken the duty of inspecting the temporary poles for safety for climbing,

the plaintiff had no legal right under the law of Maryland to rely upon inspection and maintenance by the defendant for that purpose.

14. The Court erred in instructing the jury that the defendant, as a general contractor on a construction project, was under a legal duty to maintain a reasonably safe place for the plaintiff to work.

15. The Court erred in granting Plaintiff's Prayers Numbers 1, 2 and 3.

16. The Court erred in failing to grant Defendant's Prayers Numbers 1, 2, 4, 5, 6, 7, 8, 9, 10 and 11.

17. The Court erred in assuming as a fact and finding as a fact that the plaintiff's employment was in the District of Columbia, and in failing to submit the issue with respect thereto to the jury.

18. The Court erred in failing to hold that the evidence was insufficient to justify a finding by the jury that the plaintiff's employment had a situs in the District of Columbia.

SUMMARY OF ARGUMENT

1. Under the law of Maryland, the principal contractor is the statutory employer of employees of a subcontractor, so that no action may be maintained for negligence against the principal contractor either by his own employees or the employees of a subcontractor. There is evidence that the situs of plaintiff's employment was in Maryland. This issue was not submitted to the jury. However, if the situs of the plaintiff's employment was in Maryland, it is clear that the judgment below was wrong, since the injury occurred in Maryland and the Maryland law must apply. If the situs of the plaintiff's employment was the District of Columbia, the plaintiff still may not recover by reason of the specific provisions of Article 101, section 68-3 of the 1951 Maryland Code, which expressly provides that where

an employer and employee are non-residents of the State, an injured employee may have compensation either under the laws of Maryland or under the laws of the State where he was employed, but in either event the employer's liability for compensation (as distinguished from liability for damages) is his exclusive remedy. This was a condition under which he came to Maryland to work. And if the evidence is in conflict as to whether or not the situs of the plaintiff's employment was in the District of Columbia or in Maryland, that question of fact must be left to the jury if the place of employment is the controlling issue. However, appellant insists that it is not the controlling issue, since it is a well-established principle that the law of the place where the injury occurs controls in an action for a negligent injury. Cases dealing with the right of the employee to have compensation under the law of his domicile or place of employment, rather than under the law of the State where the injury occurred, have no application, since the employee, as in the case at bar, turned his back on workmen's compensation and has elected to claim damages for a common law tort.

2. If the legal issue with respect to the applicability of the law of Maryland or the law of the District of Columbia were to depend upon the Full Faith and Credit Clause of the Constitution, the Supreme Court has concluded that the courts of the State where the suit is brought must sustain and apply the strongly expressed public policy of the State where a wrong occurs in the absence of a strong public policy to the contrary expressed either in the statutes or in the opinions of the highest court of the State where the action is brought. In the case at bar, Maryland has strongly and clearly expressed its public policy in section 68-3 of Article 101 of the Annotated Code of Maryland, 1951, and in the decisions of its highest court, whereas neither Congress acting as the legislature for the District of Columbia nor the highest court in the District of Colum-

bia has recognized any public policy in opposition to that of the State of Maryland.

3. Whether the law to be applied is that of Maryland or the District of Columbia, a statute which would require the defendant to be liable to assure compensation to another person, regardless of whether the former has committed any wrong against the latter, without extending to the former the benefit of the exclusive liability provisions of the Act requiring the payment of such compensation, deprives the person so required of his property without due process of law, in a most raw and elementary way. To distinguish between the Maryland and District of Columbia statutes, insofar as they provide for liability on the part of a principal contractor to the employees of his subcontractor, is to make a distinction without a real difference. Under both statutes, the principal contractor is liable for compensation to all employees, including both his own and those of sub-contractors, and the only thing that will relieve him is that the employee is able to collect compensation from his immediate employer.

4. The defendant is the general contractor on a construction project. It is established law that on a construction project, conditions of work are constantly changing and the contractor is not under a duty to maintain a safe place of employment except with respect to design, plan of construction or selection of known incompetents as workmen. On a construction project the general contractor does not guarantee to the employee of an electrical subcontractor, who is a lineman and at least as well informed as the employer, that a temporary electric pole is safe to climb, any more than the contractor could assure workmen on the job that a board with a nail in it would not be turned upwards so that the employee might step on it and hurt himself.

5. The plaintiff was a lineman. While he had been employed as an electrician, such employment was superior to the trade of a lineman and he had graduated from the latter.

In the particular job which he was doing when he was injured he was performing the work of a lineman. As such lineman, being aware of the risk that a pole he would climb to remove electric wires might not be steady and might fall, as a matter of law, he assumed that risk, or he was guilty of contributory negligence, in failing to take precautions to assure himself that the pole was adequately braced by soil or by guy wires or ropes, or in failing to cut the wires at the far ends. Inasmuch as the evidence with respect to these matters is not in dispute, it was not a matter for the jury, but a matter for the court, and a directed verdict should have been granted.

6. If, in this case, the duty of the contractor and the corresponding duty of the plaintiff involved issues of fact which must be submitted to the jury, the trial judge failed in its instructions adequately to inform the jury that on a construction project the duty of the contractor to workmen on the project is not the same as the duty of employers in manufacturing plants or other places where the conditions of the premises are stationary and permanent. The addition of the words "under the circumstances" were wholly inadequate to advise the jury of what the law is. And also, the court failed to instruct the jury that in determining whether the plaintiff had assumed the risk of the accident in which he was injured or was guilty of contributory negligence, he should be held to the standards of conduct of a reasonably prudent lineman and not to the standards of a reasonably prudent ordinary man.

ARGUMENT

L

The Law of Maryland Must Be Applied

The accident occurred in Maryland. The only contact of the plaintiff with the defendant was in Maryland. It is too well settled to be now open to argument that the law of the situs of the tort governs the liability therefor. This Court

said, in *Giddings v. Zellan*, 82 U. S. App. D. C. 92, 93, 160 F. 2d 585:

“As we have seen, the accident and the resulting injury occurred in Maryland, and in such circumstances the law is well settled that the right of recovery and the amount of damages depend upon the law of that State. This we held in *Rubenstein v. Williams*, 1932, 61 App. D. C. 266, 61 F. 2d 575, and again in *Paxon v. Davis*, 1933, 62 App. D. C. 146, 65 F. 2d 492; and this rule has been recognized and applied by the Supreme Court in *Western Union Tel. Co. v. Brown*, 1914, 234 U. S. 542, 547, 34 S. Ct. 955, 956, 58 L. ed. 1457, in which it is said: ‘Whatever variations of opinion and practice there may have been, it is established as the law of this court that when a person recovers in one jurisdiction for a tort committed in another, he does so on the ground of an obligation incurred at the place of the tort that accompanies the person of the defendant elsewhere, and that is not only the ground but the measure of the maximum recovery.’ ”

And the law of the place where the tort occurred includes its statutory law. *Rubenstein v. Williams*, 61 App. D. C. 266, 61 F. 2d 575.

This is the rule applied in the District of Columbia and must be followed by the court below whether it is applying local or federal jurisdiction. *Klaxon v. Stentor Electric Manufacturing Co.*, 313 U. S. 487, 85 L. ed. 1477; *Smyth Sales v. Petroleum Heat & Power Co.*, 128 F. 2d 697.

The defendant, as a principal contractor, was liable for the payment of workmen's compensation to the plaintiff under the Maryland Workmen's Compensation Act. Article 101, section 63, Annotated Code of Maryland, 1951 (section 77 An. Code 1939). Under the statute of that State, the Maryland Court of Appeals has set at rest any question whether the employee of a subcontractor may maintain an action for damages for negligence against the principal contractor, and has held that he may not maintain such an action. *State v. Bennett Building Co.*, 154 Md. 159, 140 A.

52; *Long Co. v. State Accident Fund*, 156 Md. 639, 144 A. 775; *Hurt v. Casualty Ins. Co.*, 175 Md. 403, 2 A. 2d 402. See also *Standard Acc. Ins. Co. v. Pennsylvania Car Co.*, 49 F. 2d 73; *Anderson v. Sanderson & Porter*, 146 F. 2d 58.

If the situs of plaintiff's employment is in the District of Columbia, Article 101, section 68-3 expressly limits his right of action to a proceeding for workmen's compensation:

"An employee and his employer who are not residents of this State and whose contract of hire is entered into in another State shall be exempted from the provisions of this Article while such employee is temporarily or intermittently within this State doing work for such non-resident employer, if such employer has furnished workmen's compensation insurance coverage under the workmen's compensation or similar laws of such other State, so as to cover such employee's employment while in this State; provided the extra-territorial provisions of this Article are recognized in such other State and provided employers and employees who are covered in this State are likewise exempted from the application of the workmen's compensation or similar laws of such other State. *The benefits under the Workmen's Compensation Act or similar laws of such other State shall be the exclusive remedy against such employer for any injury, whether resulting in death or not, received by such employee while working for such employer in this State.*" (italics added)

* * * * *

The court below held that the foregoing statute of Maryland did not apply; that the plaintiff's employment contract was entered into in the District of Columbia and his rights were governed solely by the Workmen's Compensation Act of the District of Columbia, and that Title 33, section 933, United States Code, gave to the plaintiff his right of action against the third person. The section does not give to the employee a right which, but for the statute, he would not have. It permits him to elect whether he will accept

workmen's compensation, which is a right he would not otherwise have, or resort to his common law remedy. He thus turns his back on workmen's compensation and must stand or fall in the case at bar on his common law rights. These rights include the rule that the law of the place where the alleged tort occurred shall govern the liability of the parties. The law of that place is Maryland; and Maryland law forbids the action. Such cases as *Cardillo v. Liberty Mutual Ins. Co.*, 330 U. S. 469 91 L. ed. 1028; *B. F. Goodrich v. Britton*, 78 U. S. App. D. C. 221, 139 F. 2d 362; *Travelers Ins. Co. v. Cardillo*, 78 U. S. App. D. C. 392, 141 F. 2d 362 have no application. These are cases which hold that if the plaintiff seeks workmen's compensation, he may have it under the law of either the District of Columbia or Maryland. As a matter of fact, such right is not denied to him by section 68-3 of Article 101 of the Annotated Code of Maryland, 1951, above quoted, but is guaranteed to him. These cases do not hold that where the employee and the defendant go into the State of Maryland and submit to its jurisdiction, they are not to be bound by a provision which protects the defendant from liability for a common law action for negligence in exchange for making it liable for workmen's compensation.

The precise question in the case at bar was decided by the First Circuit in *Bagnel v. Springfield Sand & Tile Co.*, 144 F. 2d 65. There, an employee of a subcontractor who was hired in New York was injured in Massachusetts. He brought an action against another subcontractor for the latter's action, in the District Court of the United States for the District of Massachusetts. The defendant contended that under the Massachusetts Workmen's Compensation Act Bagnel could not recover. Bagnel contended that the New York law applied, and if the Massachusetts law applied he was still entitled to recover. The court was therefore required expressly to decide whether under the circumstances precisely like those of the case at bar, the applicable law was that of New York, where Bagnel's employment

occurred, or Massachusetts, where the injury occurred. The court said:

" * * *. The principal issue which has been argued is whether the provisions of the Workmen's Compensation Law of New York, Consol. Laws, c. 67, or the Workmen's Compensation Act of Massachusetts, G. L. (Ter. Ed.) c. 152, § 1 et seq., should be applied in a case where appellant, a resident of New York, working under a contract of employment made in that state, was, while on temporary assignment to work in Massachusetts, injured there in the course of his employment."

* * * * *

"Bagnel is not here seeking compensation from his employer under the Massachusetts Workmen's Compensation Act. He is not suing his own employer in tort under the common law. He is suing the two subcontractors for negligence. It is not claimed that there is anything in the provisions of the New York Workmen's Compensation Law which would take away whatever common law rights of action he might otherwise have against the subcontractors. *Bradford Electric Light Co. v. Clapper*, 1932, 286 U. S. 145, 52 S. Ct. 571, 76 L. Ed. 1026, 82 A.L.R. 696, can therefore be no obstacle to recovery, even disregarding the fact that this case has apparently been much limited, if not substantially overruled, by *Pacific Employers Insurance Co. v. Industrial Accident Commission*, 1939, 306 U. S. 493, 59 S. Ct. 629, 83 L. Ed. 940. Since the injury occurred in Massachusetts, any rights of action in tort which Bagnel may have against subcontractors must necessarily have been created by Massachusetts law. And it is certainly within the competence of the Massachusetts legislature to take away such common law rights of action. Hence, in the present litigation, where the jurisdiction of the federal court in Massachusetts is based upon diversity of citizenship, the court is obliged to apply the Massachusetts law, as expounded by the state courts of Massachusetts so far as any guides may be found in their decisions. *Erie R. Co. v. Tompkins*, 1938, 304 U. S. 64, 58 S. Ct. 817, 82 L. ed. 1188, 114 A.L.R. 1487; *Klaxon Co. v. Stentor Electric Mfg. Co.*, 1941, 313 U. S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477."

The Supreme Court of the United States has given a clear indication that the position of the defendant in the case at bar is in accord with its construction of the full faith and credit clause of the Constitution. In *Pacific Employers Ins. Co. v. Industrial Acc. Commission*, 306 U. S. 493, 83 L. ed. 940, that court held that the law of the place where the injury occurred would be applied to permit an employee who was a resident of Massachusetts, and whose contract of employment was entered into in Massachusetts, to recover compensation in California, under the latter's compensation act, for an injury which occurred in that state, notwithstanding the Massachusetts statute provided that the remedy available under the latter's statute was exclusive of all other remedies, even if the accident occurred outside of the State. The court said, with respect to the economic protection of employees injured within it, that

“few matters could be deemed more appropriately the concern of the state in which the injury occurs or more completely within its power.”

306 U. S. 493, 83 L. ed. 940. Even more apt is the language of the Supreme Court in *Hughes v. Fetter*, 341 U. S. 609, 95 L. ed. 1212. There, a Wisconsin resident was killed in an accident which occurred in Illinois. Suit was brought in the Wisconsin Courts by a Wisconsin administrator. The Wisconsin Supreme Court had held that the suit could not be maintained because the wrongful death statute of that state established a local public policy against entertaining suits brought under the wrongful death acts of other states. The Supreme Court reversed, holding that Wisconsin must give full faith and credit to the Wrongful Death Act of the State of Illinois. The court said:

“ * * *. It is also settled that Wisconsin cannot escape this constitutional obligation to enforce the rights and duties validly created under the laws of other states by the simple device of removing jurisdiction from courts otherwise competent. We have

recognized, however, that full faith and credit does not automatically compel a forum state to subordinate its own statutory policy to a conflicting public act of another state; rather it is for this Court to choose in each case between the competing public policies involved. The clash of interests in cases of this type has usually been described as a conflict between the public policies of two or more states. The more basic conflict involved in the present appeal, however, is as follows: On the one hand is the strong unifying principle embodied in the Full Faith and Credit Clause looking toward maximum enforcement in each state of the obligations or rights created or recognized by the statutes of sister states; on the other hand is the policy of Wisconsin, as interpreted by its highest court, against permitting Wisconsin courts to entertain this wrongful death action.

“We hold that Wisconsin’s policy must give way. That state has no real feeling of antagonism against wrongful death suits in general. * * *.”

In the case at bar, Maryland has expressed itself strongly; the District of Columbia has not expressed itself in a manner contrary to the legislative expressions of Maryland.

In *Bradford Electric Light Co. v. Clapper*, 286 U. S. 151, 76 L. ed. 1026, where an employee and the employer were both residents of Vermont, and the employee was killed in an accident which occurred in New Hampshire, an action was brought by a New Hampshire administrator in the courts of that State for the recovery of damages for wrongful death. The Compensation Act of New Hampshire would have permitted recovery. The Compensation Act of Vermont precluded recovery. The Supreme Court held that, in the absence of a strong expression of public policy by the legislature or the courts of New Hampshire, the courts of that State must enforce the exclusive remedy provisions of the Vermont Act. It has been said that the *Pacific Employers* case overruled the *Bradford Electric Light Company* case, but upon an analysis of them, section 401

of the *Restatement of the Conflict of Laws* was in the 1948 Supplement changed to read as follows:

“If a cause of action in tort or an action for wrongful death either against the employer or against a third person has been abolished by a Workmen’s Compensation Act of the place of wrong, no action can be maintained for such tort or wrongful death in any state.”

Thus, if the decision of this case depends upon the expression by Maryland and the District of Columbia of what is their respective policies, it is clear that the court below should have given effect to the very strong expression of public policy in Article 101, section 68-3 of the Annotated Code of Maryland, 1951, in the absence of any expression of public policy whatever either in the statutes of the District of Columbia or in any prior decision of the courts of the District, and in view of the “strong unifying force” of the Full Faith and Credit clause of the Constitution.

Therefore, no matter what road we take—whether the trial court sat as a local court obliged to follow the rule of the law of conflict of laws established by its courts of appeals, or whether it sat as a federal court obliged to follow the rule of the state in which it sits, or whether it was obliged to weigh the strength of the public policy of Maryland and the Full Faith and Credit Clause against that of the District of Columbia, the result is the same: The law of Maryland must be applied. Under that law, the defendant is not liable to the plaintiff for negligence and the judgment below should be reversed.

II.

Under the Law of the District of Columbia No Action Should Lie in Favor of an Employee of Subcontractor Against Principal Contractor

So far as counsel for appellant have found, no case construes the Longshoremen’s and Harbor Workers’ Act (or its application to the District of Columbia) as to

whether a principal contractor is a third person subject to a common-law action for damages. This is verified by reference to the leading text-writer on Workmen's Compensation law. *Schneider*, Workmen's Comp. Text Vol. II, (3d. Ed., 1942) 216, Sec. 344; and 1951 Supplement. It is said by the same author that all but seven states have changed the common law liability of the principal contractor by placing a duty upon the latter to provide workmen's compensation insurance for the subcontractor's employees. 2 *ibid.* 175-6, Sec. 326, General.

There have been innumerable decisions directly or indirectly involving the question of the liability of the principal contractor in a common-law action for damages where the principal contractor is secondarily liable for workmen's compensation to the subcontractor's employees. There is no clear harmony in the cases, most of which are collected in the annotations, "Contractor's Liability to Employees of Contractor." *Ins. L. J.*, June, 1952, and "Common-law Remedy Against General Employer, Etc.," 151 *A. L. R.* 1359 (supplemented in 166 *A. L. R.* 813). The notewriters differ somewhat in their analyses. The former, finding that the large majority of the states follow the rule that the principal contractor is not liable under such circumstances, acknowledges that "most of the cases discussing this issue attempt to distinguish the contrary decisions from other jurisdictions on the basis of differences in the wording of the applicable statutes", but asserts that "these divergent opinions cannot be entirely explained by the differences in the statutes", although there is some difference in the wording to support the conclusion.

In the District of Columbia, this court may choose between the reason and logic of the opinions in the New York courts. While the Court of Appeals of that State, recognizing in *Clark v. Monarch Engineering Co.*, 248 *N. Y.* 107, 161 *N. E.* 436, that "arguments in favor of such an extension of the provisions of section 11 of the Workmen's Compensation Law (exclusiveness of liability) to the new liability

created by Section 56 (similar to Title 33, Section 904, U. S. Code) are not without some force," and recognizing that its decision was not in conformity with late cases in other states, overruled the Appellate Division of the Supreme Court of that State. The decision was the sole ground for reversing (248 N. Y. 625, 162 N. E. 551) the latter court in *Casey v. Shane*, 225 N. Y. Supp. 126, 221 App. Div. 660. We submit that the reasoning of the latter case is sound and should be followed in this jurisdiction rather than the opinion of the Court of Appeals. The appellate division had said, among other things:

"In the *Ives v. South Buffalo R. Co.* Case, 201 N. Y. 271, 94 N. E. 431, 34 L. R. A. (N. S.) 162, Ann. Cas. 1912 B. 156, the then Workmen's Compensation law, was held to be unconstitutional because it took property without due process of law, in that it imposed a new liability upon employers, a liability for injuries though sustained without negligence on the part of the employer. In consequence, an amendment to the Constitution was proposed and adopted, * * *. The Compensation law is valid solely by reason of this amendment.

* * *

"The act is constitutional and section 56 can only be constitutional in case a general contractor, who has sublet part of the work, stands as the employer of those working under the subcontractor * * *."

"An explanation of the 'unless' clause above quoted exists in the fact that double compensation may not be had; and if compensation is paid to an injured employee by the 'subcontractor primarily liable,' then the general contractor may not be required also to pay it.

* * *

"The contention of the plaintiff, if sustained, would impose upon the general contractor a greater liability to the employees of the subcontractor than is imposed upon him to his own employees, or than is imposed upon employers generally. If his subcontractor has not secured compensation to an injured employee, he is liable as employer for compensation. If his sub-

contractor has secured compensation, an injured employee of the subcontractor need not seek an award therefor, but may elect to prosecute the general contractor in a common-law action grounded in negligence; the general contractor is made liable as an employer, yet he is to be deprived of the immunity from other liability which the act grants to other employers. Moreover, assume there are two contractors on the same job. One secures compensation to his employees; one does not. Two men, an employee of each, are injured in one accident. The general contractor, whose insurance covers both, is liable for compensation to one, and may be liable in a negligence action to the other. We cannot think such was the intention of the Legislature. Either the general contractor stands as an employer, or he does not; if he does, he is immune from liability for negligence; if he does not, he cannot in any circumstance be liable for compensation, because then the provision of section 56 declaring it is unconstitutional. It would have been better had the Legislature included a statement in substance that the general contractor stands as an employer of those employed by a subcontractor; but this was the intent of the Legislature, else, as above stated it could not impose this new liability upon a general contractor."

We adopt and urge the reasoning of the appellate division of the New York Supreme Court above quoted, and the reasoning of the Maryland Court of Appeals in *State v. Bennett Building Co.*, 154 Md. 159, 140 A. 52; and of the U. S. Court of Appeals for the 8th Circuit in *New Amsterdam Casualty Co. v. Boaz-Kiel Const. Co.*, 115 F. 2d 950.

We submit that the legislative intent did not comprehend that a general contractor could choose whether he would assume the risk of a common-law liability by requiring the subcontractor to carry workmen's compensation insurance, or to compel his subcontractor to bear a common-law liability (without the defenses of contributory negligence, assumption of risk or the fellow-servant rule); nor that the Congress intended to give one workman on a construction project less rights than another, though they be working

side by side and perhaps hurt in the same accident. We do suppose that the legislature intended to give a workman certain and unconditional compensation for an injury in the course of his employment, without taking away from him a common-law right of action *against a stranger to the work*. Such would be the fairest and most logical result to all the employees on the job, as well as between the general contractor and the subcontractor.

If it be asserted that the general contractor may relieve himself of liability in an action for damages for tort, by carrying the workmen's compensation himself, we reply that that is just what the appellant did in this case; and, further, how in such event shall the subcontractor, as employer, protect himself not only from common-law liability, but also from losing those defenses otherwise available to him at common law: Contributory negligence, assumption of risk, the fellow-servant rule. See Title 33, Sec. 905, U. S. Code.

The constitutionality of Workmen's Compensation laws has been sustained against attacks based upon the due process clause of the Constitution *because* the legislature has merely *substituted* one remedy, on the part of the employee against the employer, for another; and unless the employer has the benefit of the exclusive-remedy provisions, it would appear that such acts would deprive the employer of property without due process of law. *New York Central R. Co. v. White*, 243 U. S. 188, 61 L. ed. 667. As the courts in Maryland and New York have said, if the general contractor has no haven from suits for negligence, an act requiring him to be liable for workmen's compensation without regard to fault is of doubtful validity. *State v. Bennett Bldg. Co.*, 154 Md. 159, 140 A. 52; *Casey v. Shane*, 225 N. Y. Supp. 126, 221 App. Div. 660.

We might add that it is a thin argument, indeed, that the acts of some states make the general contractor liable to the subcontractor's employee whether the subcontractor carries workmen's compensation insurance or not, while

others do not; and an action for negligence will not lie in the former states and will lie in the latter. Wherever the general contractor *may* be liable—where he is required by the statute to bear an initial responsibility—the object of the Act was to assure to the workmen his compensation, and it is far-fetched and strained to twist the statute to mean, in the absence of a clearly expressed statutory intent, that the employee should retain both remedies to be pursued as suits him best. As was said in *Casey v. Shane, supra*, the “unless” clause was inserted merely to prevent the employee’s having his compensation twice.

Because it is neither a sound nor a fair rule, nor in accord with what can reasonably be said to be the legislative intent, and because it is a violation of due process in the constitutional sense, we submit the trial judge’s construction of Title 33, Secs. 904-5, should not be affirmed; and the judgment below should be reversed.

III.

The Situs of the Employment Was an Issue of Fact Not Submitted to the Jury

This court does not judicially know where was the situs of plaintiff’s employment by his immediate employer, Colonial Electric Company. The allegation of the complaint that the situs was in the District of Columbia (J. App. 2-3) was denied in the answer (J. App. 5) and considerable testimony was taken on the issue. (J. App. 9-10, 70, 81-83, 87-89, 90-93). The court’s attention was directed to the importance of the issue (J. App. 78) and it was the interest of the plaintiff that the issue be submitted and found by the jury; otherwise he could not escape application of the Maryland statute, even upon his theories of liability. The defendant contended, as it does now, that the Maryland law applies regardless of the situs of plaintiff’s employment. Therefore, the factual basis on which the court denied the defendant’s motion for a directed verdict has

never been established, and the judgment below should, we submit, be reversed for that reason.

IV.

The Defendant as Contractor on a Construction Job Has Only a Limited Duty to Maintain a Safe Place to Work

The trial judge was asked to direct a verdict because, among other things, the defendant, as a contractor on a construction job, had no duty to maintain a temporary service pole in a condition "safe for the plaintiff to climb," or to warn the plaintiff of a danger which was inherent in his job. Also, on denial of that request, she was asked to instruct the jury that the law does not require a construction contractor to "maintain a safe place of employment" as that principle might be applied in other circumstances. Both of these requests were denied, and if either action was wrong, it is submitted the judgment below should be reversed.

The defendant was relying upon the principles stated by this Court in *Decatur v. Charles H. Tompkins Company*, 58 App. D. C. 102, 25 F. 2d 526. There, an employee on a construction job was injured when he stepped on a board with a nail left by other employees pointing upwards and partly covered by debris. This court said:

" * * *. It is true that in general an employer is bound to furnish his employees with a reasonably safe place in which to work. But in the erection and construction of buildings this rule can have but a limited application; for it must often happen that the dangers of such work are open and obvious, and hence that the risk of accident is assumed by the employee. *Walaszewski v. Schoknecht*, 127 Wis. 376, 106 N. W. 1070. This is especially true where the danger to which the employee is exposed is merely transitory, due to no fault of plan or construction, and where the environment of the employee must necessarily undergo frequent changes. *Armour & Co. v. Dumas*, 43 Tex. Civ. App. 36, 95 S. W. 710. It has been said that 'the

obligation of a master to provide reasonably safe places and structures for his servant to work upon does not extend to buildings in process of construction, or of demolition or dismantling, where the successive temporary conditions through which such structures must pass in such operations must from the very nature thereof be dangerous.' 39 C. J. p. 351. In *Armour v. Hahn*, 111 U. S. 313, 318, 4 S. Ct. 433, 434 (28 L. ed. 440), it is said that 'the obligation of a master to provide reasonably safe places and structures for his servants to work upon does not impose upon him the duty, as towards them, of keeping a building, which they are employed in erecting, in a safe condition at every moment of their work, so far as its safety depends upon the due performance of that work by them and their fellows.'

"These principles preclude a recovery by plaintiff in this case. The condition from which plaintiff's injury arose was a well-known incident of the work on and about the building, and the plaintiff was fully aware of that fact. * * *."

If these principles apply in the case at bar, the trial judge should have directed a verdict; or, at the very least, should have instructed the jury with respect to the limited duty of the defendant. We submit that the principles of that case are applicable. The evidence is without contradiction that the pole was only a temporary service pole, that it was originally set an adequate depth. Both the plaintiff and his foreman testified the pole was steady and safe enough when the plaintiff climbed the pole to put the wires up. It was in the course of the construction project that grading operations may have removed some of the support from the base of the pole. The evidence does not establish whether employees of defendant or of a grading subcontractor did the particular grading work, and—more important—there was no evidence that any employee realized that the pole had been undermined; nor that any responsible employee of defendant, who might have been in a position to understand, knew the pole was dangerous

to climb or even might have to be climbed. Thus, the condition of which plaintiff complains is one of those "successive temporary" conditions through which the structure must pass in the course of construction. As the court said, *supra*,

"This (the limited application of the rule that an employer must provide a safe place to work on a construction job) is especially true where the danger to which the employee is exposed is merely transitory, due to no fault of plan or construction, and where the environment of the employee must necessarily undergo frequent changes."

Since the accident occurred in Maryland, the law of that State must apply. *Giddings v. Zellan*, 82 U. S. App. D. C. 92, 93, 160 F. 2d 585. The Maryland law with respect to the duty of one who maintains electric service poles to keep them safe for the linemen to climb is stated clearly and positively in *Consolidated Gas Company v. Chambers*, 112 Md. 324, 331-336. There, the court in part said, after a careful review of the authorities:

"* * *, the general rule to be deduced from them may be thus stated: when the employer has no independent system of inspection of poles, cross-arms, steps, etc., and the lineman has no reason to believe that such inspection is made, he had no right to rely on the employer for such inspection, but must make such tests himself as may be necessary to ascertain whether it is safe to go up upon them, and cannot hold the employer responsible for injuries received by him by such poles, cross-arms, or steps giving away, unless there was some defect in them when they were originally placed in position, or the employer had some knowledge of the defect, which was not communicated to the lineman,—provided, of course, the lineman is not such an inexperienced person as is entitled to be instructed as to the danger. * * *. Indeed it is far safer for the linemen themselves to make the inspection and such tests as may be necessary for their safety, as they would do so at the very time they went upon

them, while in many instances that would be impossible if separate inspectors were relied on."

The *Decatur* case states a rule not peculiar to this jurisdiction. *Kuptz v. Ralph Sollitt & Sons Const. Co.*, 88 F. 2d 532, is especially in point. There, a subcontractor's employee sued the general contractor under circumstances in principle indistinguishable from the case at bar. The employee, an electrician, was injured when, pursuant to instructions from his foreman to do certain work on or under the roof of the building, in going about his job, he stepped on certain forms which he claimed the general contractor knew, or ought to have known, would not support his weight. When the form gave way, he was injured. The court held that the defendant was not under a duty to maintain a "safe place of employment" for the workmen on a construction job, and that the employee was as well able to see and know the danger as was the defendant. Under such circumstances the duty of the defendant to use due care was to be measured in the light of the circumstance that the work was a construction job, where inherently dangerous conditions successively obtain.

Far from informing the jury of the limitations upon the defendant's duty to "maintain a safe place of employment", the court's charge would have required of the defendant a high standard of care. The trial judge stated and restated that the defendant had a duty to maintain a safe place for the plaintiff to do his work, and never once told the jury that a construction job was, by its very nature, a dangerous place to work. (J. App. 111, 112, 115 (twice), 116). The court even told the jury that, in the absence of appearances to the contrary, the plaintiff

"had a right to assume that the Woodner Company maintained the pole in a reasonably safe condition for the purpose and use for which it was erected." (J. App. 112)

and undertook to suggest to the jury what had no evidence, expert or otherwise to support it, that the defendant might have done other things to make the pole safer:

“the base of the pole, according to the testimony, was in the earth and not in concrete or anything of that kind; the opposite end of the pole was not attached to anything for steadying purposes.

“Under these circumstances we might infer that the pole would give some under weight or pressure, even if it were under the earth, even if the base were in the earth six feet.”

It cannot be fairly argued that the case did not go to the jury upon the premise that the defendant had an affirmative duty to warn the plaintiff that grading operations may have undermined the earth support of the pole. Since this was an inherent danger on a construction job, and since the plaintiff, as an experienced lineman, was in just as good a position to know the danger as the defendant, the jury took the case upon an erroneous principle.

V.

Assumption of Risk and Contributory Negligence

It is difficult, on the one hand, to distinguish in argument between the extent of the duty of defendant to warn the plaintiff of a danger on a construction project, and the duty of the plaintiff to inspect to find out for himself whether such danger exists. On the other hand, it is equally difficult to distinguish between the duty of the plaintiff to use care, and his assumption of the risk of an accident against which he might have protected himself by a careful inspection. Therefore, there is an overlapping of the argument on these problems.

The plaintiff contended, and the trial judge concluded and instructed the jury, that the plaintiff had a right to assume the pole was safe to climb and had no duty to make an affirmative and careful inspection; that he was not on notice

of any danger beyond that which might be seen by a "reasonably prudent person." (J. App. 112). The defendant unsuccessfully contended, and still contends, that as a matter of law the plaintiff is held to the standard of a reasonably prudent *lineman* and that, the danger that a pole might not be safe to climb being a common danger in the lineman's trade, the plaintiff had a duty carefully to inspect the pole to see if it was adequately supported by earth at the base, or by guy wires or ropes, and not to cut wires until he was reasonably sure he could do so without releasing the pole's essential support. Whether the decision rests upon the doctrine of assumption of risk, or of contributory negligence, is not important.

Again, the law applicable is that of the State of Maryland, as has been asserted earlier in this brief. The Court of Appeals of that State has held in accordance with the defendant's contention. In *Consolidated Gas Co. v. Chambers*, 112 Md. 324, the court reviewed at length the authorities both in Maryland and other states and laid down a definite rule of law for Maryland (pp. 334-5):

" * * *, the general rule to be deducted from them may be thus stated: when the employer has no independent system of inspection of poles, cross-arms, steps, etc., and the lineman has no reason to believe that such inspection is made, he had no right to rely on the employer for such inspection, but must make such tests himself as may be necessary to ascertain whether it is safe to go upon them, and cannot hold the employer responsible for injuries received by him by such poles, cross-arms, or steps giving away, unless there was some defect in them when they were originally placed in position, or the employer had some knowledge of the defect, which was not communicated to the lineman—provided, of course, the lineman is not such an inexperienced person as is entitled to be instructed as to the danger. * * *. Indeed it is far safer for the linemen themselves to make the inspection and such tests as may be necessary for their safety, as they would do so at the very time they went upon them,

while in many instances that would be impossible if separate inspectors were relied on."

As the annotator in 26 L. R. A. N. S. 774 said in a note entitled "Injury to Electric Lineman through Defect in Pole or Its Appurtenances", following *Lynch v. Saginaw Valley Traction Co.*, 153 Mich 174, 116 N. W. 983:

"The great weight of authority supports the conclusion reached in the above case that an experienced lineman assumes the risk of the breaking of any pole he is called upon to climb in the course of his employment, if the defect which caused the pole to break was not of original construction, and that therefore his employer owes him no duty to inspect the pole before sending him upon it. * * *."

The plaintiff was an experienced lineman and he was one of the two employees of the electrical subcontractor who could climb. The pole was known by the plaintiff to be a temporary pole. There is no evidence of any reliance by the plaintiff upon a system of inspection. As was said in *Britton v. Central Union Telephone Co.*, 131 Fed. 844, 845:

"A qualified lineman may be presumed to know how to take care of himself. * * *. If he applied for employment as a lineman, and was apparently mature and intelligent, the company might act safely upon the presumption that he was qualified for his work, and capable of exercising due care to guard against the dangers incident to his duties. In such case no duty to instruct would be imposed. * * *."

And the same court at length described what the "reasonable care" of a "prudent lineman" might be:

"* * *. Linemen must, in the very nature of the occupation, be often required to work alone, or in association with another lineman, and it would seem quite impracticable and unreasonable to send one man as an inspector with another of equal fitness to test a pole before climbed by the latter. The case might be altogether different if skill of a kind not presumably

required from a lineman in the usual course of his calling was necessary to apply the tests reasonably sufficient in such cases. The tests which the plaintiff's evidence shows to be customarily used are by shaking, by pushing against the pole by means of a long staff with a point at one end, and by throwing away the dirt next the surface at the base of the pole and examining by use of an axe or crowbar the soundness of the pole at that point. These tests are simple, and quite within the range of the experience of a qualified lineman, as shown by the evidence in this case. The experience of any such lineman would advise him that the life of a pole varies with climate, soil, and character of the wood. The same experience would warn him of the danger of putting the strain incident to climbing and removing or adjusting wire upon a pole of uncertain age, for a pole may well stand under the support of wires extending from one pole to another which will not stand under the weight of a man with the tension of the wires removed. That he should be held to assume the risks incident to climbing after making such examination and tests as his own experience and judgment should indicate were necessary is not inconsistent with the fair implications arising from his acceptance of employment. * * *."

This court has expressed the law in accord with the defendant's contention, substituting window-washers for lineman, in *Green v. Pyne*, 53 App. D. C. 271, 289 Fed. 929. There, a window washer was injured when he fell as a result of the absence of sash weights in a window which he used to support himself. The owner who had hired him knew of the absence of the sash weights and failed to warn him. The court held that the plaintiff was guilty of contributory negligence as a matter of law, or that he had assumed the risk involved. The court said:

"Proceeding upon the theory that the relationship existed, the rule that it is the duty of the master to provide for his servant reasonably safe surroundings,—that is, a reasonably safe place in which to work * * * is not determinative of the question whether the plain-

tiff, under the facts disclosed, was chargeable with contributory negligence.

“Plaintiff was an experienced window washer, and the evidence indicates that he was engaged as such by the defendant. Defendant was concerned solely with the result of the work and not as to the manner or means of accomplishment. As to this the plaintiff was a free agent. When he approached this large third-story bay window it was for him to decide, after inspection, how he should do this particular part of his work, and what safeguards he should adopt for his own protection. He knew or should have known that to stand on a window ledge and depend for his safety upon a hold by one hand was in any aspect a dangerous undertaking. Certainly, before subjecting himself to the dangers inherent in such a situation, common prudence dictated that he should have made a careful inspection of the window, to the end that precautions be taken against the possibility of the window falling in the manner detailed. * * *.”

The rule applied by this court in *Green v. Pyne, supra*, is in accord with the general rule. See *Haskell v. Kertz Co.*, 181 Iowa 30, 162 N. W. 598, L.R.A. 1917 F. 881.

The position of appellant is that the court below should have directed a verdict for the defendant on the ground that the plaintiff was either guilty of contributory negligence as a matter of law or that he assumed the risk of the accident which occurred. Failing such direction of a verdict, the trial judge should, at the least, have instructed the jury that the standard of conduct required of the plaintiff was that of an experienced lineman and not that of a “reasonable and prudent man.” Any help the defendant may have had from the granting of its prayers 3 and 4 (J. App. 101-2) was nullified, not only by the denial of prayers 2 (J. App. 101) and 10 (J. App. 103-4) but by the addition of the court after reading prayer 4, of the instruction that

“In connection, however, with this instruction the term concerning assuring yourself of the safety of the

pole means simply the exercise of ordinary care and caution which the ordinarily prudent man would exercise in the same circumstances. It does not mean absolute assurance." (J. App. 117)

Especially, the defendant's prayer 10 (J. App. 103-4) states the principles which ought to have been told the jury, even if contributory negligence did not exist as a matter of law and even if the plaintiff did not, as a matter of law, assume the risk of injury. In the whole charge, there is an absence of any instruction that the jury should consider the elements set forth in defendant's prayer 10 in determining whether, as a fact, the plaintiff assumed the risk, or was contributorily negligent. For this reason alone, the judgment below, we submit, should be reversed.

CONCLUSION

Because the Maryland law protects it, and because the District of Columbia should be construed to do so, the appellant believes it should not have been subjected to liability in this action. Because it was in no better position to warn him than the plaintiff was to protect himself, the appellant believes the rules applied by the trial judge were unsound and not in accord with the authorities. It is submitted that the judgment below should be reversed.

Respectfully submitted,

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BRIEF FOR APPELLEE

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 11,624

JONATHAN WOODNER COMPANY, a corporation,
Appellant,

v.

ERNEST W. MATHER, *Appellee.*

Appeal from the United States District Court for the
District of Columbia

LEONARD S. MELROD,
JOHN M. LONDON.

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QUESTIONS PRESENTED

1. Where the District of Columbia Compensation Act expressly declares as a matter of strong, clear public policy, that the Act's "provisions . . . *shall apply* in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs," does the Act apply to the injury of an employee who lived in the District with his dependents, and was hired in the District, and was injured at work in nearby Maryland, while temporarily assigned to work there by, and for his District employer, who at all times maintained control of, and supervised the employee from the employer's place of the business in the District?

2. Where the District Compensation Act expressly provides that an injured workman covered by the Act has the right, under the Act, to sue any person who negligently caused his injury, but that he can not sue his employer if his employer carried workman's compensation insurance, does a workman, employed by an insured sub-contractor, have the right under the Act to sue the general contractor who negligently caused the injury, where the general contractor was never in any sense his employer, and the general contractor had no compensation liability to the workman?

3. Where the Compensation Act of the place where the injury occurred, Maryland, expressly exempts from that Act a workman who is a non-resident employee of a non-resident employer, and expressly says that the Act does not apply to him, and plaintiff was the non-resident employee of a non-resident employer, and other requirements of the exemption section of the Maryland Act were satisfied, does the Maryland Act have any conceivable application to the plaintiff?

4. Where the Compensation Act of the District, which was the situs of plaintiff's employment, expressly provides that its provisions "shall apply" to an employee injured outside of the District in the course of his District employment; and the Compensation Act of Maryland, where the injury occurred, purports also to apply to plaintiff; and there is an apparent conflict between the two Acts; and the injured employee elects to pursue his rights under the District Act; and it is well-settled under the decisions of this Court and of the Supreme Court that he has such a right to elect to proceed under the District Act; may the courts of the District allow plaintiff to pursue his rights, in the courts of the District, under the District Act, and refuse to substitute the conflicting, foreign statute for the District Act, because the District Act manifestly expresses the strong, clear public policy of the District to provide, and determine, the rights of employees injured in the course of their District employment, "irrespective of the place where the injury or death occurs"?

5. Where there was very substantial evidence that defendant, the general contractor in control of the premises, negligently undermined the foundation of defendant's electric light pole; that the physical facts at the scene concealed the negligent undermining of the pole; that defendant caused plaintiff, as the employee of a sub-contractor, to climb the pole when defendant knew the pole was unsafe to climb, because of defendant's own affirmative acts of negligence; and defendant failed to warn plaintiff of the danger; and the pole toppled, causing plaintiff serious, permanent physical injury, as the result of defendant's negligence; was it error for the trial court to refuse to direct a verdict for defendant?

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 11,624.

JONATHAN WOODNER COMPANY, a corporation,
Appellant,

v.

ERNEST W. MATHER, *Appellee.*

Appeal from the United States District Court for the
District of Columbia

BRIEF FOR APPELLEE

COUNTER-STATEMENT OF THE CASE

This is an appeal by Jonathan Woodner Co., defendant below, from a jury verdict in favor of appellee, plaintiff below, Ernest W. Mather. The verdict was entered in an action in the District Court for personal injuries suffered by plaintiff, the employee of a sub-contractor, as the result of the negligence of defendant, the general contractor. For convenience, the parties will be described as they appeared in the court action.

Defendant's statement of the case is one-sided and omits certain relevant facts and statutory provisions. Plaintiff submits the following counter-statement of the case.

The evidence, as set forth in more detail below, was that plaintiff, a District of Columbia resident, employed in the District by a District subcontractor, was temporarily assigned to work on a construction project in nearby Maryland; (App. 9, 29, 81-82); that plaintiff, at the instance of defendant, the principal contractor, climbed defendant's pole; (App. 12-16) that the said pole collapsed, and permanently injured plaintiff,¹ because defendant had negligently undermined the pole, and had negligently held the pole out as safe to climb, and had negligently failed to warn plaintiff of the concealed, dangerous condition of the pole caused by defendant, and known to defendant, but not known to plaintiff. (App. 1-68)

Plaintiff sued defendant under the District of Columbia Compensation Act (Title 36, Section 501, D. C. Code, 1940, 1951, adopts the Longshoremen's Act, Title 33, Chapter 18, U.S.C., as the District Compensation Act). The District Compensation Act declares that "the provisions . . . shall apply in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs" (Title 36, Section 501, D.C. Code). Section 933 (a) of the District Compensation Act provides that a District employee may elect to sue a third party "other than the employer." Section 933 (f) provides that a District employee may claim compensation from his employer for any deficiency between the amount recovered in the third-party suit and the amount of compensation payable by the employer under the Act. Plaintiff elected to sue defendant as a third party and to claim compensation under the District Act for the deficiency, if any, and filed notice, as required by the Act, with the District Compensation authorities, that he was pursuing these two remedies under the Act. (App. 4).

¹ Medical testimony was omitted from the Joint Appendix by agreement of counsel for plaintiff and defendant because defendant raises no question on this appeal as to the reasonableness of the verdict, or as to the nature or degree of plaintiff's injury.

1. Evidence As To The Situs Of Plaintiff's Employment.

Plaintiff lived with his family in the District of Columbia at all times. (App. 9, 34-35). Plaintiff testified that he was hired by Colonial in the District, and first reported to work for Colonial in the District, at 54th Street N. W. (App. 9); that at all times during his employment by Colonial, Colonial's office was in the District (App. 9-10); that on the day of the accident, Feb. 20, 1950, he was temporarily working in Maryland for Colonial, his District employer (App. 9).

The only other witness as to situs of plaintiff's employment was William McKenney, defendant's only witness at the whole trial. At the time of the accident, McKenney operated Colonial Electric Company, the corporate subcontractor. (App. 69). On direct examination, McKenney did not contradict plaintiff's testimony that the contract of employment with plaintiff was made in the District. (App. 70). But he claimed he could not remember where it was made, and claimed he had lost the relevant records. (App. 70, 79, 83, 89). The court, during a bench conference out of the jury's hearing, in overruling a motion by defendant, commented that McKenney's testimony was "very unsatisfactory." (App. 79). Cross-examination developed the close business tie-up between McKenney and defendant. (App. 86). On cross-examination, McKenney was confronted with an affidavit, sworn to by him on July 3, 1950, wherein he categorically stated that plaintiff was hired in the District and that he was injured while temporarily working in Maryland, but that he was still subject then, and at all times, to control and direction from Colonial's principal place of business in the District. (App. 81-83). He identified and affirmed the truth of this affidavit on cross-examination. Then, on re-direct, he said:

"I believe that the affidavit was prepared after a telephone conversation or at his office (the office of plaintiff's counsel). I don't remember, but *it was read*

by me and at that time I believed it to be the truth. I still do." (App. 87-88)

Defense counsel, in submitting written prayers, did not request that the jury be asked to decide where the contract of employment was made, or where Colonial's principal place of business was, or anything else relating to the situs of plaintiff's employment. (See App. 101-104). Nor did defense counsel make objection after the jury had been instructed and no such issues had been submitted to the jury. (See App. 118-119).

The affidavit of McKenney, which was attached to plaintiff's Opposition to Motion for Summary Judgment and which was exhibited to the jury (App. 90-91), was, by inadvertence, omitted from the Joint Appendix. It is therefore set out in full below:

"IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2125-50

ERNEST W. MATHER,
1116 F Street, N. E., Washington, D. C.
Plaintiff,

v.

JONATHAN WOODNER COMPANY, a corporation,
1200 Eighteenth Street, N.W., Washington, D. C.,
Defendant.

AFFIDAVIT

DISTRICT OF COLUMBIA,

I, William McKenney, President of the Colonial Electric Company, Inc., being first duly sworn under oath according to law, hereby depose and say that the above corporation has its principal place of business formerly at 925 New York Avenue, N. W., and now at 3308 - 14th Street, N. W. in the District of Columbia. That it is engaged in the electrical contracting business in said District of Columbia. That on June 16, 1949, the Colonial Electric Company, Inc. hired Ernest Mather, plaintiff, as an electrical installation man and

wireman. That the employment contract between Colonial Electric Company, Inc. and said Ernest Mather was entered into in the District of Columbia. That Mather was between the period of June 16, 1949, and February 20, 1950, employed almost half the time in the District of Columbia. That in February, 1950, Mather was temporarily assigned to a construction project on University Lane and Colesville Road in Prince Georges County, Maryland. That at all times during the course of Mathers' employment with the Colonial Electric Company, Inc., Mather was under the control and subject to orders from the Colonial Electric Company's principal place of business in the District.

"/s/ WILLIAM E. McKENNEY
WILLIAM E. McKENNEY

"Subscribed and sworn to before me this — day
of —, 1950.

/s/

"Notary Public

2. Evidence As To Primary Negligence, Contributory Negligence And Assumption Of Risk.

The following evidence was uncontradicted: The pole which toppled, injuring plaintiff, was defendant's and defendant had originally placed it and embedded it in some four to five feet of earth (App. 57-58, 44). Customary safe practice required that this pole, which was some twenty-eight and one-half feet high, be embedded a minimum of four to six feet in earth (App. 12, 39). In the course of his employment by Colonial, the plaintiff had climbed this pole, at a time when the pole was still embedded in the proper depth of some four to six feet of earth (App. 12, 44). Plaintiff safely attached electrical wiring to the top of the pole (App. 12). Defendant had ordered Colonial to affix these wires (App. 12).

Subsequent to plaintiff's initial safe ascent, the defendant, in grading the area, had removed earth around the pole, so that the pole was embedded in but six to eight inches of earth, instead of the minimum safe embedding depth of

four feet (App. 39, 50, 59, 66-67, 44). Plaintiff was unaware of the alteration of the embedding of the pole (App. 13). Defendant never informed plaintiff or Colonial or any of its agents, servants or employees, that the pole embedding had been changed and that the pole, therefore, was no longer safe to climb (App. 9, 68). On the morning of February 20, 1950, defendant, through its foreman, ordered Colonial, through its foreman, to cut down the wires running from the top of the pole to nearby buildings (App. 10-11, 57). When Colonial assigned the job to plaintiff, plaintiff obtained and put on his climbing gear and went with defendant's foreman, who pointed out the pole (App. 11-13, 45). The wires attached to the pole were affixed solely as electrical conduits, and never were intended to support the pole (App. 14). The usual and customary method of removing such wires was for a workman to mount the pole and then cut the wires from the top of the pole (App. 42). Plaintiff had been doing inside electrical work, and had expected to continue this inside work on the morning when defendant's foreman gave the order to Colonial's foreman (App. 10). Defendant's own employees were to uproot and remove the pole after Colonial's employee had removed the wires (App. 15, 58). The pole was to be taken down by defendant's employees not because it was defective or to be replaced, but because its temporary purpose of conveying electricity during construction work was completed (App. 11, 37, 47). Such a temporary pole should always be embedded as securely as a permanent pole (App. 26). Plaintiff was in the course of his employment by Colonial in ascending the pole and cutting the wires when the pole toppled, and plaintiff was never in any sense an employee of defendant (App. 9, 57). The pole fell for the very reason that it was embedded only six to eight inches in the earth and, therefore, could not sustain plaintiff's weight (App. 49). Plaintiff was severely and permanently injured when the pole fell and hurled him to the asphalt paving (App. 3).

Plaintiff, a fellow employee and defendant's own foreman testified that on the morning of February 20, 1950, there were no indicia discernible on the pole, even after it had fallen, and was lying on the ground, to indicate the earth around the pole had been removed (App. 15, 50, 59). Whatever dirt might originally have clung to the pole in the area between the point where it had been initially embedded some four feet and the six or eight inch point had been washed away by the rains prior to the morning of February 20th (App. 46).

After the accident, Chasen, Colonial's foreman, looked at the pole, lying on its side on the ground, and saw only fresh soil at the base extending some six or eight inches (App. 43). Later, he examined the fallen pole closely (App. 43) and found no earth clinging to the pole above the eight inch point, but noticed a slight difference in the color of the wood above the eight-inch point, where mud at one time apparently had clung to the pole and then had been washed away by the rain. He said, "You had to look it over good, though" to see it (App. 43) "... you would have to look close, to be looking for a place on it." (App. 46). "... It wasn't mud. It was where mud had been." (App. 46). Asked, "In the ordinary course of events of a person going up that pole for the purpose of cutting that wire, would they observe anything unusual about that pole?", he replied: "I don't think they would have." (App. 46).

Plaintiff did not know that defendant had caused the area around the pole to be graded so that the butt of the pole was in but six or eight inches of earth on the morning of February 20th (App. 33, 13). Plaintiff testified that he believed defendant could not have graded around the pole because the pole would have been in the way (of grading machinery); that, when he approached the pole, on February 20th, he observed the earth sloping up towards the pole (App. 33). "The way it looked to me was the same as the first time I was ever on it." (App. 33). The ground around the pole did not appear to have been dug up—it was frozen (App. 59, 66). A fellow employee who observed

the vicinity before and after the accident said he, too, would have climbed the pole as plaintiff did (App. 50). Defendant's own foreman, Probst, who supervised the grading in that area and the pole, testified that the ground for some twenty to thirty feet around the pole, did not appear to have been broken up (App. 60).

Although plaintiff previously had some limited experience as a lineman, before working for Colonial, he was employed by Colonial and worked on the instant project as an electrician and not as a lineman (App. 37, 77, 82). There was no lineman on this project, Chasen, Colonial's foreman testified (App. 42). McKenney, the operator of Colonial, testified that such wire removal did not call for a workman with specialized skill, and that "A general electrical contractor does not go out and hire a man specifically for climbing poles." (App. 77). There was no evidence defendant corporation was, or should have been unaware of this general practice and custom of general electrical contractors on such jobs. The evidence indicated that a lineman would only consider guying a pole before climbing it if there was reason to believe it was defective, as for example where a pole was being replaced (App. 19). This pole was not being replaced; there was nothing defective about the pole itself which had been up only a few months (App. 37, 12, 20). Plaintiff tested the pole for vibration, just before ascending, and then as he ascended (App. 17-18). The vibration did not indicate the pole embedding had been altered (App. 18).

At the conclusion of the case, defendant's motion for a directed verdict was denied (App. 93). The court fully charged the jury on the issues of negligence, contributory negligence and assumption of risk (App. 104-119). The jury resolved these issues in favor of plaintiff (App. 119).

The *key section* of the D. C. Compensation Act—which defendant fails to quote or discuss anywhere in its brief—is Title 36, Sect. 501, which adopted the Longshoremen & Harbor Workers Act as the District of Columbia Workmen's Compensation Act.

Title 36, Sect. 501, D. C. Code:

"§ 36-501 [19:11]. Longshoremen's and Harbor Workers' Compensation Act made applicable to District of Columbia.

"The provisions of title 33, chapter 18, of the Code of Laws of the United States, including all amendments that may be made thereto after May 17, 1928, shall apply in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term 'employer' shall be held to mean every person carrying on any employment in the District of Columbia, and the term 'employee' shall be held to mean every employee of any such person. (May 17, 1928, 45 Stat. 600, ch. 612, § 1.)"

(Other relevant sections of the District and Maryland Compensation Acts are set forth in plaintiff's argument).

SUMMARY OF ARGUMENT

The District of Columbia Compensation Act, because of the strong, clear public policy of the District to provide and determine rights of workmen injured in the course of their District employment, expressly applies to an injury suffered by a District employee, while temporarily working outside of the District, in the course of his District employment. The District Act, therefore, applied to plaintiff, because the uncontradicted evidence established that he was a District resident, hired in the District by a District employer, and was regularly employed by that employer in the District and was injured in Maryland while temporarily working there in the course of his District employment. The decisions of this Court and of the Supreme Court sustain such application of the District Act because of the substantial public interest of the District.

Plaintiff, the employee of a District sub-contractor, properly elected to proceed under the District Act and properly pursued his right under Section 933, Title 33, U. S. C., of the District Act, to sue defendant, the general

contractor, as a third-party tort-feasor. It is well decided that such an action will lie under the District Compensation Act, and under the New York Compensation Act, after which the District Act was modeled. The sub-contractor was insured, and therefore the general contractor had no compensation liability under the District Act, and consequently was a third party "other than the employer."

Section 68-3 of the Maryland Compensation Act expressly exempts a workman who, like plaintiff, was a non-Maryland employee of a non-Maryland employer and was injured in Maryland while temporarily working there in the course of his non-Maryland employment. The sole purpose of this section was to exclude such an employee from all provisions of the Maryland Compensation Act and remit him exclusively to the "benefits" of his home state statute, whatever those benefits might be. The purpose of the Maryland Compensation Act, expressed in its preamble, was to shift the financial burden consequent upon injuries suffered by Maryland workmen in extra-hazardous Maryland employment from the State of Maryland to Maryland industry, and to relieve the Maryland courts of much of the litigation arising from such accidents. The corollary purpose of the exclusion clause was to exempt workmen who, though injured in Maryland while temporarily working there, would, by virtue of their residence with their dependents in another jurisdiction, where they were regularly employed, not be likely to become a charge upon the Maryland community and would not be likely to seek legal recourse in the Maryland courts. Plaintiff was such an employee and was within the exemption. Therefore, the Maryland Act had no relevance to the case at bar—it categorically remitted him to the District Act. The other provisions of the exemption section were also satisfied: Plaintiff was covered by the District Compensation Act; his employer had obtained compensation under the District Act with respect to plaintiff; and the District Act gives reciprocity to the Maryland Act as to employees in-

jured in the District whose situs of employment was in Maryland.

Even assuming that the Maryland Compensation Act was in conflict with the District Compensation Act, the District Court for the District of Columbia was not required to give full faith and credit to a conflicting statute of another jurisdiction and substitute the foreign act for the District Act. The abiding principle of the decisions of the Supreme Court is that either the state of the situs of the employment or the state where the tort occurred has sufficient substantial interest, as a matter of public policy, to determine by its own compensation act what are the rights and disabilities of an injured workman, and that neither state is obliged to enforce a foreign, conflicting statute; the forum court in either state may enforce the forum's statute. The District, as the situs of plaintiff's employment and residence, had the power to determine what correlative compensation and third-party-suit rights plaintiff had under the District statute in respect to an injury which occurred outside of the District in the course of plaintiff's District employment. The District exercised that power and manifested its strong, clear public policy in the District Compensation Act provisions which set up integrated, interlocking, complementary compensation and third-party suit provisions as rights given by the statute to plaintiff. Plaintiff elected to pursue the right to sue defendant as a third-party tort-feasor. The Act's public purpose is to give plaintiff the right to sue a tort-feasor or obtain compensation from his employer, whichever is the greater. The Act also establishes that it is in the public interest that while industry bears the burden of plaintiff's injury, initially, where the injury was caused by negligence, the tort-feasor must bear that burden ultimately. Thus, the third-party action provisions are affected with a public interest just as the compensation provisions are. And defendant concedes that the District can apply its compensation provisions in complete disregard of the Maryland Act pro-

visions. It could never have been the legislative intent, in giving plaintiff the right to sue third-party tort-feasors, to remit him to the Maryland Compensation Act for determination of who, if anyone, is such a third-party, and when, if ever, and under what circumstances, if any, he can exercise the right given by the District statute. The result, obviously contrary to legislative intent, would be to ingraft on the District Compensation Act a definition under the Maryland Compensation Act of who is a third party based upon compensation provisions contained in the Maryland Act but not in the District Act, namely, absolute compensation liability of the general contractor to the employee of a sub-contractor. The sole question in this case was: If the District and Maryland Compensation Acts both applied to plaintiff, could he elect to proceed under the District Act? Since the answer is clearly in the affirmative under the well-established rule laid down by the Supreme Court, the District Act alone applied, once plaintiff elected to proceed under it, and the Maryland Act was completely out of the picture after he made his initial election.

The court properly charged the jury on negligence, contributory negligence and assumption of risk. The very cases defendant cites establish that defendant, as general contractor in control of the premises, owed a duty to plaintiff to provide a reasonably safe place to work under the circumstances. There was substantial evidence to go to the jury and to support the jury's verdict that defendant's negligence caused plaintiff's injury. This evidence and the evidence as to the alleged contributory negligence and assumption of risk required submission of the case to the jury.

ARGUMENT

I.

THE DISTRICT OF COLUMBIA COMPENSATION ACT APPLIED TO PLAINTIFF AND GAVE HIM THE RIGHT, AS THE EMPLOYEE OF A SUB-CONTRACTOR, TO SUE DEFENDANT, THE GENERAL CONTRACTOR, AS A THIRD-PARTY TORT-FEASOR.

A. The District Compensation Act Expressly Declares the Clear, Strong Public Policy of the District That Its Compensation Act "Shall Apply" To A District Employee "Irrespective Of The Place Where the Injury or Death Occurs."

Defendant contends that the Maryland Compensation Act applied to the case at bar and that its provisions barred suit by plaintiff, an employee of a sub-contractor, against defendant, a general contractor, as a third party, for an injury suffered in Maryland. Defendant reasons that the compensation law of the situs of the tort governs exclusively.

The answer is that the law of the situs of the tort does not govern if the forum has an over-riding public policy that the forum's law, and not the law of the situs, shall apply. Here, the over-riding public policy of the forum, the District of Columbia, is that the District Compensation Act shall apply to District employees injured in the course of their District employment, irrespective of the place of their injury. The District has such a substantial interest in the welfare of its employees that it can and will apply the District Act, and not a foreign act, to such employees, whether injured in or out of the District. This public policy of the District is expressed clearly and strongly in the District Compensation Act. Section 501, Title 36, of the District of Columbia Code (1940 and 1951), in adopting the Longshoremen's Act as the District Compensation Act, states:

"The provisions of title 33, chapter 18, of the Code of Laws of the United States, including all amendments that may be made thereto after May 17, 1928, shall apply in respect to the injury or death of an

employee of an employer carrying on *any employment* in the District of Columbia, *irrespective of the place where the injury or death occurs*; except that in applying such provisions the term "employer" shall be held to mean every person carrying on *any employment* in the District of Columbia, and the term "employee" shall be held to mean every employee of any such person." (Emphasis supplied)

The application of the District Statute, in accordance with its express command—as the expression of the District's strong, public policy—to injuries which occurred outside the District, has been categorically sustained by this Court in *Moyer v. Cardillo*, 73 App. D. C. 261 (1941), *B. F. Goodrich Co. v. Britton*, 78 App. D. C. 221 (1943), *Travelers Insurance Co. v. Cardillo*, 78 App. D. C. 392 (1944) *Travelers Insurance Co. v. Cardillo*, 78 App. D. C. 394; and by the Supreme Court in *Cardillo v. Liberty Mutual Insurance Co.*, 330 U. S. 469 (1947).

In *Cardillo v. Liberty Mutual Insurance Co.*, *supra*, the employee was a resident of the District of Columbia, and the employer was carrying on business in the District, as well as elsewhere. The Supreme Court held that, notwithstanding that plaintiff employee had been working on a construction job in Virginia continuously for more than three years, "There is no question (plaintiff) was employed by a District of Columbia employer The Act applies . . . irrespective of the place where the injury occurs." The workman was hired in the District, was under orders from the District, commuted daily between his home in the District and his place of work. The Supreme Court said:

"Nothing in the history, the purpose or the language of the Act (Longshoremen's and Harborworker's Compensation Act applicable to the District) warrants any limitations which preclude its application to the case. The act in so many words applies to every employee of an employer carrying on any employment in the District of Columbia, 'irrespective of the place where

the injury or death occurs.' Those words leave no possible room for reading in any implied exception excluding those employees like Ticer (plaintiff) who have substantial business and personal connections in the District and who are injured outside the District In other words, the District's legitimate interest in providing adequate workmen's compensation measures for its residents does not turn on the fortuitous circumstances of the place of their work or injury. Nor does it vary with the amount or percentage of work performed within the District. Rather it depends upon some substantial connection between the District and the particular employee-employer relationship, a connection which is present in this case. Such has been the essence of prior holdings of the Court of Appeals."

To the same effect, see *Magnolia Petroleum Co. v. Hunt*, 320 U. S. 430, 437 (1943), *Alaska Packers Association v. Industrial Accident Commission*, 294 U. S. 532 (1935), and *Pacific Employer's Ins. Co. v. Indust. Accident Comm.*, 306 U. S. 493 (1939).

Therefore, the District Compensation Act applied to plaintiff, although he was injured in Maryland, if the situs of his employment was in the District.

B. The District Compensation Act Expressly Applies to "An Employee of an Employer Carrying on Any Employment in the District of Columbia." The Uncontradicted Evidence Established That Plaintiff Was Such An Employee and Therefore Plaintiff was Under the District Act.

The District Compensation Act provides that it applies to an "employee of an employer carrying on any employment in the District of Columbia . . . irrespective of the place where the injury or death occurs . . .," Title 33, Section 501, D. C. Code (1940 and 1951). The uncontradicted evidence established that plaintiff was such an employee and therefore the act applied to him.

Plaintiff, Mather, lived in the District of Columbia with his family (App. 9); worked "almost half the time"

during his employment by Colonial in the District of Columbia (App. 83) and "at all times during the course of Mather's employment . . . Mather was under the control and subject to orders from the Colonial Electric Company's principal place of business in the District of Columbia" (App. 83).

Colonial, plaintiff's employer maintained an office in the District of Columbia, was licensed to do business in the District of Columbia and did do business in the District of Columbia (App. 69, 81, 83), and carried compensation insurance in the District of Columbia (App. 80). Plaintiff was injured in the course of his employment by Colonial while temporarily assigned to work on a Maryland project (App. 83). (See *supra* p. 5).

These facts, *per se*, established that the injury was within the command of section 501, title 36. A fortiori, the District statute applied because the contract of employment was made in the District. The trial court so found (App. 79, 93) (Brief, 15). Plaintiff categorically stated that the contract of employment was made in the District (App. 9). McKenney, who managed Colonial at the time of the accident, was called as defendant's only witness at the trial. He had meanwhile become an employee of an affiliate of defendant corporation (App. 84-86). He never denied that the employment contract with plaintiff was made in the District, but claimed a lapse of memory as to where he hired plaintiff, and claimed he had lost the relevant records (App. 70, 89). McKenney's recollection was refreshed on cross-examination by an affidavit sworn to by him two years before the trial—before Colonial was sold to an affiliate of defendant corporation (App. 81). He identified as true the statement in that affidavit that "the employment contract between the Colonial Electrical Company, Inc., and said Ernest Mather was entered into in the District of Columbia." (App. 81). On re-direct examination, McKenney said that when he signed the affi-

davit "it was made by me and *at that time I believed it to be the truth. I still do.*" (App. 88).

Thus, there was no conflict in the evidence to submit to the jury as to situs of the employment contract. Defense counsel, by failure to request that the jury be instructed to determine the situs of plaintiff's employment, and by failure to object when no such instruction was given, waived the right to object on this appeal that there was no such charge. *Carter v. Carusi*, 112 U. S. 478 (1884); *Order of the United Commercial Travelers of America v. Nicholson*, 9 F. 2d. 7 (CCA 2, 1925); *Lindsey v. Testa*, 200 F. 124 (CCA 1, 1912); *Waters v. Guile*, 234 F. 532 (CCA 6, 1916). If defendant contends at pps. 25-26 of its brief that the court erred in not ruling on where the contract of employment was made, defendant answers its own argument at page 15 of its brief, where defendant effectively concedes: "The court below held . . . that the plaintiff's employment contract was entered into in the District of Columbia."

The next question that arises is whether a District employee of a sub-contractor can sue the general contractor as a third party under the District Act, which is discussed and answered in the affirmative in the next section.

C. An Employee of a Sub-Contractor, Injured by the Negligence of the General Contractor, while in the Course of His Employment by the Subcontractor, Can Sue the General Contractor as a Third Party Tort-Feasor Under the District Compensation Act.

The employee of a subcontractor can sue the general contractor as a third party tort-feasor under section 933 (a) of the District Compensation Act, which states:

"(a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commis-

sioner in such manner as the Secretary may provide, to receive such compensation or to recover damages against such third person."

1. *The cases hold that such an action will lie under the District Compensation Act.*

Defendant reports it found no cases on whether an employee of a sub-contractor can sue a general contractor as a third party tort-feasor under the Longshoremen's Act, or the District statute which adopts the Longshoremen's Act (Brief 20). Judge Bryan, in *Liberty Mutual Insurance Co. v. Goode*, 97 F. S. 316 (D.C., Va.) (1951), held that such an action will lie under the District statute:

"The District of Columbia law is an adaptation of the Longshoremen's and Harbor Workers' Compensation Act, S. et. seq., 33 U.S.C.A. S. 901 et seq., D. C. Code 1940 SS 36-501, 36-502, 33 U.S.C.A. S 901 note, and by analogy will be interpreted to render a general contractor suable as a 'third person' by an employee of a subcontractor, *Continental Casualty Co. v. Thorden Line*, 4 Cir., 1866 F 2d 992, 996."

In *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946), the Supreme Court indicated it would not countenance judicial legislation to restrict rights of injured workmen to sue third parties under the Longshoremen's Act:

"We may take it, therefore, that Congress intended the remedy of compensation to be exclusive as against the employer. See *Swanson v. Maria Bros.*, decided this day (328 U.S. 1, 33 U.S.C.A. SS 905, 10 F.C.A. Title 33, SS 905.) But we cannot assume, in face of the Act's explicit provisions, that it intended this remedy to nullify or affect others against third persons. Exactly the opposite is true. The legislation therefore did not nullify any right of the longshoreman against the owner of the ship, except possibly in the instance, presumably rare, where he may be hired by the owner. *The statute had no purpose or affect to alter the stevedore's rights as against any but his employer alone.*"

2. *The District Compensation Act was patterned after the New York Compensation Act which the New York Court of Appeals has always held authorized such an action.*

The Longshoremen's Act was drafted by Congress with the New York Compensation Act as a model. Therefore, the Longshoremen's Act should be construed in light of construction of the New York Act by the New York Court of Appeals. *Case v. Pillsbury*, 148 F2d 392 (CCA 9, 1945); *Terminal Shipping Co. v. Branham*, 47 F. Supp. 561, (D.C., Md.), aff'd 136 F2d 655 (CCA 4, 1943); *Hartford Acc. & Ind. Co. v. Hoage*, 66 App. D.C. 154 (1936).

The New York Court of Appeals rule is that:

"Since the general contractor has *always* been deemed to be a third party with respect to the subcontractor's employees, it follows that the latter can bring an action for negligence against the general contractor under the Workmen's Compensation Law (of New York)" *Sweezy v. Arc Electrical Construction Co.*, 295 N. Y. 306, 67 N.E. 2d 369 (1946).

To the same effect, see *Clark v. Monarch Engineering Co.*, 248 N.Y. 107, 161 N.E. 436 (1928); *Lumsden v. Robinson*, 248 N.Y. 529, 162 N.E. 512 (1928); *Casey v. Shane*, 248 N.Y. 625, 162 N.E. 551 (1928); *Matter of Passarelli v. Columbia Engineering and Contracting Co.*, 270 N. Y. 68, 200 N. E. 585.

The foregoing New York Court of Appeals cases construed section 56 of the New York Statute:

"A contractor . . . who subcontracts all or any part of such contract shall be liable for and shall pay compensation to any employee injured . . . unless the subcontractor primarily liable therefor has secured compensation." (*Sweezy v. Arc Electrical Construction Co.*, *supra*)

Section 904 (a), Title 33, of the District Act, is basically identical:

"In the case of any employer who is a subcontractor, the contractor shall be liable for and shall secure the

payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment."

Also, section 29 (1) of the New York Act parallels section 933 of the District Act in giving the injured workman entitled to compensation from his employer the right to elect to sue as a third party tort-feasor, "some person other than the employer."

Defendant's brief quotes the unsound reasoning of the lower New York court in *Casey v. Shane*, 225 N. Y. Sup. 126, 221 App. Div. 660 (Brief 22-23). This decision was reversed by the New York Court of Appeals in *Casey v. Shane*, 248 N. Y. 625, 162 N. E. 551, in a per curiam opinion by a distinguished bench presided over by Chief Judge Cardoza. The New York Court of Appeals reiterated the ruling of the New York Court of Appeals in *Clark v. Monarch Engineering Co.*, *supra*, a decision in which Chief Judge Cardoza also participated. The reasoning of the New York Court of Appeals in these cases, and in *Sweezy v. Arc Electrical Construction Co.*, *supra*, is as follows:

The general contractor has only a secondary liability to pay compensation—he pays only if he failed to require the sub-contractor to secure compensation for the sub-contractor's employee. The statutory section imposing this secondary liability does not make the general contractor a statutory employer of the sub-contractor's employee. The general contractor remained a stranger to the employee whom he neither hired nor controlled. Secondary liability is based not on the relationship of general contractor to employee, but on the relationship of general contractor to sub-contractor. The general contractor is in a better position than the worker to see that the sub-contractor whom he selects secures compensation, and if the sub-contractor does—as in the case at bar—the general contractor has no compensation liability. His contract with the sub-contractor may be drawn to require that the sub-contractor carry insurance for his employees. Section 56 of the New York

Act—like the parallel section 904 (a) of the District Act—is merely a device to secure enforcement of the act in respect to the actual employer—the sub-contractor.

We submit that it must be presumed that when Congress applied the Longshoremen's Act to the District it was aware that the New York Statute, after which the Longshoremen's Act had been patterned, had previously been construed to authorize a sub-contractor's employee to sue the general contractor as a third party. In any case, had Congress intended to make the general contractor immune from suit, it would have so declared in the statute.

The Maryland statute is clearly distinguishable from the District Act: The Maryland Act makes the general contractor absolutely liable for compensation regardless if the subcontractor is insured; the District Act makes the contractor liable for compensation only if the subcontractor is not insured. The Maryland Act states that "... where compensation is claimed from or proceedings are taken against the principal contractor, then, in the application of this Article, *reference to the principal contractor shall be substituted for reference to the employer, ...*" Section 63, Art. 101, 1951 Maryland Code (emphasis supplied). There is no parallel provision in the District Act. The District Act is based on the relationship that exists between subcontractor and contractor; the Maryland Act creates a statutory relationship between the general contractor and the employee of the subcontractor.

Since the subcontractor was insured in the case at bar (App. 80), the general contractor had no liability under the District Act to pay compensation at any time to plaintiff. Under the District Act, absolute immunity from suit is accorded the employer only in exchange for his absolute compensation liability. The employer, the subcontractor, had that liability; he received in exchange the immunity. The general contractor, defendant, has been subject to no compensation liability under the District Act and so he gets no immunity from suit. Nor can defendant say it was

ever subject to "potential" liability to pay plaintiff compensation under the District statute since it could have, and no doubt did, require the subcontractor to be insured as to plaintiff throughout plaintiff's employment by the subcontractor.

Therefore, as shown above, plaintiff could sue defendant as a third party tort-feasor under the District Compensation Act.

However, defendant contends that the Maryland Compensation Act, which precludes such a suit under the Maryland Act, was a valid defense to the instant action. In the next section, plaintiff points out that the Maryland statute, by its express terms, exempted this plaintiff from its provisions and therefore the Maryland Compensation Act could not have any effect upon plaintiff's cause of action under the District Act.

D. The Maryland Compensation Act Exempts This Plaintiff From Its Provisions. Therefore, the Maryland Compensation Act Has No Bearing Whatever on the Case at Bar.

The Maryland Compensation Act expressly exempts this plaintiff from any of its provisions, and, therefore, the Maryland statute has absolutely no bearing whatever on the case at bar.

Article 101, of the Maryland Code, which is the Maryland Compensation Act, expressly provides, in section 68-3, that:

"An employee and his employer who are not residents of this State and whose contract of hire is entered into in another State *shall be exempted* from the provisions of this Article while such employee is temporarily or intermittently within this State doing work for such non-resident employer, if such employer has furnished workmen's compensation insurance coverage under the workmen's compensation or similar laws of such other State, so as to cover such employee's employment while in this State; provided, the extra-territorial provisions of this Article are recognized in such State and provided employers and employees who

are covered in this State are likewise exempted from the application of the workmen's compensation or similar laws of such other State. *The benefits* under the Workmen's Compensation Act or similar laws of such other State shall be the exclusive remedy against such employer for any injury, whether resulting in death or not, received by such employees while working for such employer in this State.

* * * * *

“But for all purposes of this Article, casual, occasional or incidental employment outside of this State by the Maryland employer of an employee or employees regularly employed by said employer within this State shall be construed to be employment within this State.” (Emphasis supplied).

Whom this section intended to exclude from the Maryland Act is indicated by whom the Maryland Act intended to cover. The statute was enacted to shift from the State of Maryland to Maryland industry the burden of providing financial assistance to Maryland victims of extra-hazardous labor, and to provide these persons with adequate remedies that would relieve the Maryland courts of much of the burden of litigation arising from industrial accidents. (See Preamble to Maryland Compensation Act, Article 101, 1951 Maryland Code). The intent of Section 68-3, then, was to exclude from the Maryland Act a workman, who, though injured in Maryland, would not become a financial burden to the Maryland community, and who would not burden Maryland courts with litigation, viz., a workman who, though injured in Maryland, while temporarily working there, lived with his dependents in another state, where he was regularly employed by an employer who had temporarily assigned the workman to Maryland. Such an employee would be likely to return to his home state and seek community assistance and prosecute his legal claims there. The first part of Section 68-3 excludes such an employee from the Maryland Act: “An employee and his employer who are not residents of this state and whose contract of hire is

entered into in another state shall be exempted from the provisions of this Article while such employee is temporarily or intermittently within this state doing work for such non-resident employer . . . ”

Plaintiff was clearly an employee intended to be exempted by the foregoing clause. He lived in the District of Columbia with his dependents (App. 9, 34-35). He was only temporarily employed in Maryland (App. 83). (See *supra*, p. 5). He had been hired in the District of Columbia and was regularly employed in the District by Colonial Electrical Company, Inc. (App. 81-83). Colonial exercised control and supervision over plaintiff, even while plaintiff was temporarily in Maryland, from Colonial's place of business in the District of Columbia (App. 83). Therefore, the residence of the employer, in relation to this employee, was not in Maryland but in the District of Columbia where Colonial's employment relationship with plaintiff had its situs.

After the injury, plaintiff and his dependents became a problem of the District, not of Maryland. He returned to the District and it was in the District that plaintiff sought to pursue his remedies.

It should be noted that the Maryland legislature, in another part of Section 68-3, wrote a corollary provision to the exclusion clause applying the Maryland Act to "an employee" injured while temporarily working outside Maryland for a "Maryland employer" who "regularly employs" the workman in Maryland. Certainly Maryland intended to recognize the same rights of a District employee, injured while temporarily working in Maryland in the employ of a District employer who regularly employs the workman in the District, to pursue the remedies under his home-state statute. The non-residence clause of Section 68-3 is satisfied by plaintiff and his employer in the instant case since he was regularly employed by a District employer in the District and was injured while temporarily employed in Maryland.

Aside from the situs of the relation of Colonial, as an

employer, to plaintiff, as an employee, the "residence" of a corporation is in the state where it is incorporated and since Colonial was incorporated in Delaware (App. 92) it was legally resident in Delaware and therefore not a resident of Maryland. A corporation is "... a person, although an artificial one, inhabiting and belonging to that state (of incorporation), and therefore entitled, for the purpose of suing and being sued, to be deemed a citizen of that state." *Louisville C. C. & R. Co. v. Letson*, 2 How. 497, 555.

The other provisions of the exemption section were also satisfied. Plaintiff was "temporarily" working in Maryland. The employer, Colonial, had "furnished workmen's compensation insurance coverage under the workmen's compensation or similar laws of such other State (the District), so as to cover such employer's employee while in this State." (App. 80.)

The proviso, "provided the extra-territorial provisions of this Article are recognized in such state . . .", is satisfied by the District Statute which purports, by its express language, in Section 501, Title 36, to apply only to employees whose situs of employment is in the District, regardless of where injured. Therefore, the District statute by its express provision would not apply to an employee whose situs of employment was in Maryland, regardless of where the injury occurred. Principles of comity as well as this express statutory language in the District Act would prompt courts in the District to hold, where Maryland and District Compensation Acts were involved, as Judge Bryan did in the *Goode* case, in respect to the Virginia and District statutes, that the forum can preclude any conflict from arising by applying the principles of "... giving the force of her law to the Virginia employees and the shape of the District statute to those employees including the plaintiff residing and making their contracts there."

Now let us consider the second sentence of Section 68-3 which provides that "The benefits under the Workmen's

Compensation Act or similar laws of such other State shall be the exclusive remedy against such employer for any injury, whether resulting in death or not, received by such employee while working for such employer in this State."

Defendant claims this sentence in Section 68-3 bars plaintiff from suing defendant, the general contractor, as a third party *under the District Act* (Brief 15). Defendant does not indicate how it arrived at this conclusion.

Apparently, defendant contends that Section 68-3 tells plaintiff he can proceed under the District Compensation Act but that he can pursue no remedies against anyone under the District Act except the right to get compensation from his employer. This would mean that plaintiff could not sue *any* third parties under the District Act.

Plaintiff submits that defendant's interpretation of the meaning of Section 68-3 is utterly untenable. The Maryland legislature could not conceivably have intended to exclude from its act persons it deemed it had no sufficient interest in regulating on the proviso that the Maryland legislature be allowed to rewrite the statute under which those parties had to proceed.

Section 68-3 is an exclusion section, declaring that non-Maryland employees "shall be exempted from the provisions" of the Maryland Act. The second sentence (quoted, *supra*, at p. 23) states that since such an employee is excluded from the Maryland Act, he cannot proceed under the Maryland Act against his employer—that the "benefits" under the compensation act or similar act, of the employee's home state, whatever those benefits may be, shall be his exclusive remedy against his employer. The first quoted sentence excludes the non-Maryland employer from the provisions of the Maryland Act in mandatory terms—"shall be exempted." The second sentence remits him *exclusively* to the statute of his home state, whatever it may say. Section 68-3 does not give the employee who is under 68-3 an alternative to proceed *either* under the Maryland or his home state statute, as defendant assumes (Brief 10-11).

He is absolutely barred from proceeding under the Maryland Act.

Next we note that the second sentence, in barring the non-Maryland employee from proceeding under the Maryland Act, remits him to the "*benefits*" of his home state act. If this sentence meant, as defendant contends, that the non-Maryland employee can only get "*compensation*" under the statute of his residence, why didn't the Maryland legislature use the word compensation instead of benefits? It must be presumed that the legislature used words with purpose and with an understanding of their plain meaning. "Benefits" in its plain and obvious sense does not mean "compensation"; it means "an act of kindness; a favor conferred" (Webster's 20th Century Dictionary), viz., any right, privilege or other *beneficial* alternative made available by the statute of his home state to the workman. The Maryland legislature did not try to define the "benefits" of another state's statute—that was left to the legislature of the foreign state.

If defendant contends that this second sentence bars the non-Maryland employee from proceeding against anyone but his employer, the subcontractor (Brief 11, 15, 20), then Section 68-3 would bar the non-resident employee from suing *any* third party under the foreign act, i.e., the District Compensation Act. If this were so, the Maryland legislature would have presumed to tell an employee, who comes within the clause excluding him from the Maryland Act, that the Maryland Act, having excluded him, proposes to tell him he cannot have the rights under his home state act that Maryland employees have under the Maryland Act. That is, Maryland employees under the Maryland Act, expressly are given the right to sue third parties other than their employer (other than the statutory and contractual employer, according to the Maryland cases). (See Article 101, Sec. 59). But, if defendant's interpretation is right, the Maryland Act bars the non-resident employee from proceeding under his home state's act

against any third parties. This is patently not the legislative intent.

The legislative intent, manifested expressly in just so many words, is to exclude an employee injured in Maryland, whose situs of employment was in another state, and remit him to the "*benefits*" under the compensation or equivalent laws of the other state. The first exclusion sentence adds the provisos (1) that he be covered by the compensation or similar act of his home state, to make sure that the employee doesn't find he's excluded from both statutes and has no statute to proceed under; and (2) that the other state similarly exempts from its laws an employee injured in that state the situs of whose employment was Maryland. The second sentence is not a proviso, all the provisos being listed in the first sentence; the second sentence states the effect of the exemption—that he cannot proceed under the Maryland Act but can only proceed under his home state statute.

In another part of Section 68-3, the Maryland legislature wrote the corollary provision that Maryland employees injured outside of Maryland are bound by the Maryland Act. Thus, the Maryland Act tries to avoid any conflict between its statute and foreign compensation acts by providing that Maryland law applies to an employee whose situs of employment was in Maryland, regardless of situs of injury; and conversely, that the foreign law shall apply and not the Maryland law when the situs of employment was in the foreign state, regardless if the injury occurred in Maryland. Defendant's interpretation would completely defeat the obvious legislative intent to preclude conflict between statutes by creating a brand-new conflict, by interpreting the Maryland Act so that it purports to rewrite the rights set out in a foreign statute, as to persons over whom the Maryland Act foregoes a claim to jurisdiction because it felt such persons, by dint of their non-Maryland status, were of scant interest to Maryland.

Since the Maryland Act exempted plaintiff, only the District Act applied and the District Act gave plaintiff the

right to sue defendant as a third party. However, in the next section plaintiff assumes, *arguendo*, that plaintiff was not within the exemption clause of the Maryland Act.

E. When the District and Maryland Compensation Acts Are in Conflict, the Full Faith and Credit Clause Does Not Require the District to Subordinate Its Strong and Clear Public Policy, Expressed in the District Statute, to the Foreign Statute.

Defendant contends that when plaintiff elected to sue the defendant as a third party tort-feasor under section 933 (a) of the District Compensation Act, plaintiff "thus turns his back on workmen's compensation and must stand or fall in the case at bar on his common law rights." (Brief 16.) At common law, defendant reasons, the law of the place of the tort, Maryland, governs and the Maryland Compensation Act bars a suit against a general contractor as a third party. (Brief 16). However, defendant does not contend the law of Maryland, apart from the Maryland Compensation Act, would bar the instant action (Brief 10-20).

Defendant concedes that the decisions of this Court and the Supreme Court, "... hold that if the plaintiff seeks workmen's compensation he may have it under the law of either the District of Columbia or Maryland." (Brief 16.) Defendant tries to avoid these decisions by arguing that the District statute gives the plaintiff the right to compensation but "does not give" him a right to sue a third party tort-feasor and only remits him to the common law of the situs of the tort. (Brief 15.)

The first fallacy in defendant's argument is that section 933 (a) of the District Compensation Act does *give* plaintiff a right to sue third part tort-feasors. As Chief Judge Groner of this Court said in *Marlin v. Cardillo*, 68 App. D. C. 201 (1938), in referring to the applicable provisions of the compensation act contained in 33 U.S.C.A. s.933:

"The purpose of the act is to give to the injured employee or in the event of his death to his dependents, (a) the compensation provided by the act or (b) the

amount recovered from a third party, whichever is the greater. The compensation benefits, however, are subject to the condition that, if the injured or the dependent desires to prosecute a claim against a third party, he must give notice of his election so to do under section 33 (a) of the act, 33 U.S.C.A. s.933 (a). When he has done this and prosecuted his claim to a conclusion, if the recovery is less than the amount payable under the act, the employer must under section 33 (f) pay the difference. If the claimant elects not to sue the third party but to take compensation, the employer is given by the act an assignment of the rights of the claimant against the third party and may institute suit and take the recovery, subject only to the payment to the claimant of any excess above the amount which the employer is required to pay . . . ”

Also see *Moore v. Hechinger*, 75 App. D. C. 391, 394 (1942).

Defendant conceals another and basic flaw in its argument by failing to mention *why* the compensation act of the District can apply to an accident in Maryland, contrary to the common law principle that the law of the situs of the tort governs. The reason is that the law of the situs of the tort does not govern where the forum has an overriding *public policy*. Here, the forum, the District of Columbia, has expressed its strong, clear public policy to determine itself the rights of District employees, regardless of where they are injured: The District Compensation Act declares that “*the provisions . . . shall apply . . . irrespective of the place where the injury or death occurs.*” Title 36, section 501, D. C. Code. *Cardillo v. Liberty Mutual Insurance Co.*, *supra*.

In the case of *Magnolia Petroleum Co. v. Hunt*, 320 U. S. 430 (1944), the Supreme Court stated: “ . . . the state of the employer and employee is free to apply its own compensation law to the injury of the employee rather than the law of another state where the injury occurred . . . and for like reasons we held also that the state of the place of injury is free to apply its own law to the exclusion of the law of the state of the employer and employee.”

The Court held in *Magnolia* that even if each state says its compensation law shall exclusively apply, if plaintiff has not yet submitted to adjudication in either state, he may elect to pursue his remedies under the statute of, and in the courts of the contract state, or under the statute of, and in the courts of the situs of the injury state.

Thus, by virtue of the substantial interest that the state of plaintiff's employment has in the circumstances and consequences of his employment within that state, that state can apply its statute to that plaintiff in respect to an injury suffered, in the course of his employment, though the injury occurred outside the state, contrary to the rule that the law of the situs of the tort governs.

The District statute expresses in mandatory language the legislative intent that "the provisions"—not merely some but *all* of the provisions—shall apply irrespective of the place of injury. Congress did not declare in the act that the District *could* enforce its compensation provisions irrespective where the injury occurred but that it *could not* enforce its third-party suit provisions irrespective where the injury occurred.

The District, as the residence of the workman and his dependents, must bear the burden of support of the workman and his dependents. The District has determined, as a matter of social policy, to shift that burden so that it shall be borne, initially by industry, and, if there was a tort-feasor, ultimately by the tort-feasor, who caused the injury. The Act is made compulsory and the injured employee receives compensation from his employer regardless of fault. But, to make the burden fall ultimately upon the person whose fault caused an industrial injury, the statute gives the employee and employer complementary rights to sue the tort-feasor. If the worker recovers from the wrongdoer an amount equal at least to what he could receive in compensation, the employer is relieved of compensation payment. If he recovers less, the employer must make up the difference in compensation. If the employee elects to receive compensation, rather than sue the wrongdoer, the

employer is subrogated to the worker's rights and can sue the wrongdoer, and any amount he recovers above the compensation he paid, goes to the workman. In any event, the statute manifests the public purpose that the injured workman has the right under the statute to obtain the maximum recovery, either from compensation or from third-party suit, "whichever is the greater," as this Court said in *Marlin v. Cardillo, supra*. Thus, the public policy of the District is manifested in the provisions relating to third-party suit as in the compensation provisions. These interlocking provisions have the same common public purpose.

Moreover, as was pointed out, *supra*, at pps. 17-22, the *compensation* provisions in the District Act determine that the general contractor is a third-party to the employee of a sub-contractor; the compensation provisions in the Maryland Act determine that the general contractor is not such a third-party. This is further proof that the third-party provisions and the compensation provisions are interdependent and that the public policy of the District manifest in the compensation provisions cannot be disengaged from the third-party suit provisions. And it establishes that if the Maryland Act's definition of who is a third party under the Maryland Act is used to determine whom plaintiff can sue under section 933 (a) of the District Act as a third party, the result is to ingraft on the District Act a Maryland third party provision *based on Maryland's compensation provisions*. And yet it is conceded that the Maryland compensation provisions cannot affect the District in applying District compensation provisions. It would be utterly inconsistent to say the District can apply the District's compensation provisions but must apply the effects of the Maryland compensation provisions. And it would be incongruous to grant the general contractor an immunity from suit under the District's section 933 (a) because of a provision contained in the Maryland Act but not in the District Act—an absolute liability to pay compensation under the Maryland Act, which liability he does not have under the District Act.

Certainly the District of Columbia had the *power* to fully determine, by statute, the rights a District employee under the District Compensation Act had against third party tort-feasors, and to determine who was such a third party tort-feasor in regard to an injury that the District employee suffered in Maryland. *Bradford Electric Light Company v. Clapper*, 286 U. S. 151, is authority that the state where the contract of employment is made clearly has the power to determine by its statute whether a right of action exists or doesn't exist in favor of an injured workman for an injury he suffered outside of the contract state, regardless of the law of the situs of the tort.

It was clear to the Federal District Court in Virginia in the *Goode* case that the District of Columbia, as the state of plaintiff's employment, had the power to determine what, if any, rights of action its injured workman had against third parties and who was such a third party in regard to an injury suffered in Virginia. Judge Bryan held that not only did the District have such power, but that where suit was brought in Virginia where the injury occurred, Virginia courts would sustain a right of action against a third party established by the District Compensation Act, even though such an action would not lie under the Virginia Act, where the Court found that by virtue of the Virginia Act's own provisions the Virginia Act did not apply to the plaintiff in that case.

Also in *Hynes v. Indian Trails*, 181 F. 2d 668 (CCA 7, 1950), cert. den. 340 U. S. 824, the 7th Circuit Court held that where a third-party action was authorized by Michigan, which was the contract state, Illinois, where the injury occurred, would not refuse to apply the Michigan Act, although such a third-party action was barred by the Illinois Act. The Seventh Circuit Court of Appeals held that the contract state as well as the tort state had a right to determine what third party rights an injured workman had. The Court in the *Hynes* case found that because of certain provisions in the Illinois Act, that statute did not apply to

this particular plaintiff and therefore an action under the Michigan statute against a third party would lie in the Illinois Courts.

If plaintiff had sued in Maryland under the District statute, the court there could have refused to apply the District statute and could have applied the Maryland statute. That was what the court said in *dicta* in *Bagnet v. Springfield Sand and Tile Co.*, 144 F. 2d 65. The Federal Court there said:

“ . . . in the present litigation where the jurisdiction of the Federal Court in Massachusetts is based upon diversity of citizenship, the court is obliged to apply the Massachusetts law. . . . ”

This *dicta* supports the proposition that since both states had power to legislate as to the rights of an employee, New York as the situs of plaintiff's employment, Massachusetts as the situs of the injury, a New York court could and no doubt would apply the New York Compensation Act. When the Court said Massachusetts had the right to determine the liability of subcontractors in that state, under the statute of that State, where the tort occurred, it said no more than that Massachusetts had that power; it did not say that New York could not likewise determine what rights to sue its employee did or did not have under the New York statute. Nor did the Court deny that New York courts could enforce the New York Act.

Under the rule laid down by the Supreme Court in the *Magnolia* case, either the District or Maryland may apply its own or the foreign statute. Either state has a sufficient substantial interest to determine plaintiff's rights, the District as the situs of plaintiff's employment, Maryland as the situs of the accident. Therefore, the District, as the forum court, was free to apply its statute, which it did.

“In the case of local law, since each of the states of the Union has constitutional authority to make its own law with respect to persons and events within its bor-

ders, the full faith and credit clause does not ordinarily require it to substitute for its own law the conflicting law of another state, even though that law is of controlling force in the courts of that state with respect to the same persons and events. *Pink v. A.A.A. Highway Exp., Inc.*, 314 U.S. 201, 209-11, 62 S.Ct. 241, 246, 247, 86 L. Ed. 152, 137 A.L.R. 957, and cases cited; *Klaxon Co. v. Stentor Electric Co.*, 313 U.S. 487, 496-498, 61 S.Ct. 1020, 1021, 1022, 86 L. Ed. 1477. It was for this reason that we held that the State of the employer and employee is free to apply its own compensation law to the injury of the employee rather than the law of another state where the injury occurred. *Alaska Packers Ass'n v. Industrial Accident Commission*, supra, 294 U.S. at pages 544-550, 55 S.Ct. at pages 522-525, 79 L. Ed. 1044. And for like reasons we held also that the state of the place of injury is free to apply its own law to the exclusion of the law of the state of the employer and employee. *Pacific Employers Ins. Co. v. Industrial Accident Commission*, supra, 306 U.S. at pages 502-505, 59 S.Ct. at pages 633, 634, 83 L. Ed. 940. . . .

"Apart from the demands of full faith and credit, recovery in a transitory action for injury to person or property, *whether in tort or for compensation*, can of course only be had in conformity to the law of the state where the action is maintained. Even where the state of the forum adopts and applies as its own the law of the state where the injury was inflicted, the extent to which it shall apply in its own courts a rule of law of another state is itself a question of local law of the forum. *Finney v. Guy*, 189 U.S. 335, 23 S.Ct. 558, 47 L. Ed. 839; *Klaxon Co. v. Stentor Electric Co.*, supra, 313 U.S. at pages 496, 497, 61 S.Ct. at pages 1021, 1022, 86 L. Ed. 1477; cf. *Worcester County T. Co. v. Riley*, 302 U.S. 292, 299, 58 S.Ct. 185, 188, 82 L. Ed. 268." *Magnolia Petroleum Co. v. Hunt*, 320 U.S. at 212, 216. (Emphasis supplied).

However, defendant contends that where the foreign state has a strong, clear public policy in regard to its statute and the forum court has no such strong, clear public policy in regard to the statute of the forum, that the full faith and credit clause requires that the forum court subordinate

its statute to the foreign statute. (Brief 20.) As we have shown above, the District has a clear, strong public policy that all of the provisions of its compensation act shall apply to a District employee and the District can enforce this policy in its own courts. Moreover, defendant is in error when he claims that the Maryland statute has a strong, clear policy that when a workman injured in Maryland proceeds under the statute of his home state, viz., the District Compensation Act, that he only be allowed to get compensation from his employer and not be allowed to obtain any other benefits under the District Compensation Act. Defendant finds this policy in section 68-3 (Brief 11, 15, 20.) and as we have shown, *supra*, at pages 26-29, there is no such policy in section 68-3. The policy of Maryland, expressed in the Maryland Act in section 68-3 actually is that the act should not apply to a non-resident.

But even if the Maryland Act did express a public policy such as defendant claims it finds in the Act, and even if the Maryland Act went further and said that its provisions should exclusively determine what rights a workman injured in Maryland had, even then the District of Columbia could disregard the Maryland statute and apply its own statute expressing its own public policy to determine the rights of a District employee, no matter where he was injured.

Thus, in *Alaska Packers Ass'n v. Industrial Accident Commission of California*, 294 U.S. 532, 545-550 (1935), the Supreme Court held that California, as the state where plaintiff's employment contract was made, could, under the full faith and credit clause, apply its compensation act to the plaintiff, despite the fact that the compensation statute of Alaska, where the accident occurred, declared it provided exclusive remedies for one injured in that state. The Supreme Court said:

"Since each statute provides a different remedy, the (state) court recognized that, by setting up the Alaska statute as a defense to the award of the Commission, the two statutes were brought into direct conflict. It

resolved the conflict by holding that the courts of California were not bound by the full faith and credit clause to apply the Alaska statute instead of its own.

"To the extent that California is required to give full faith and credit to the conflicting Alaska statute, it must be denied the right to apply in its own courts a statute of the state, lawfully enacted in pursuance of its domestic policy. We assume, as did the state court, that the remedy provided in the Alaska statute is one which could also be applied by the California courts, except for the conflict. . . .

"It has often been recognized by this Court that there are some limitations upon the extent to which a state will be required by the full faith and credit clause to enforce even the judgment of another state, in contravention of its own statutes or policy. . . .

"A rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own. Unless by force of that clause a greater effect is thus to be given to a state statute abroad than the clause permits it to have at home, it is unavoidable that this Court determine for itself the extent to which the statute of one state may qualify or deny rights asserted under the statute of another. See *Olmsted v. Olmsted*, 216 U.S. 386, 30 S.Ct. 292, 54 L. Ed. 530, 25 L.R.A. (N.S.) 1292; *Aetna Life Insurance Co. v. Dunken*, *supra*, page 393 of 266 U.S., 45 S.Ct. 129.

"The necessity is not any the less whether the statute and policy of the forum is set up as a defense to a suit brought under the foreign statute or the foreign statute is set up as a defense to a suit or proceedings under the local statute. In either case, the conflict is the same. In each, rights claimed under one statute prevail only by denying effect to the other. In both the conflict is to be resolved, not by giving automatic effect to the full faith and credit clause, compelling the courts of each state to subordinate its own statutes to those of the other, but by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight.

“The enactment of the present statute of California was within state power and infringes no constitutional provision. Prima facie every state is entitled to enforce in its own courts its own statutes, lawfully enacted. One who challenges that right, because of the force given to a conflicting statute of another state by the full faith and credit clause, assumes the burden of showing, upon some rational basis, that of the conflicting interests involved those of the foreign state are superior to those of the forum. . . .

“The interest of Alaska is not shown to be superior to that of California. No persuasive reason is shown for denying to California the right to enforce its own laws in its own courts, and in the circumstances the full faith and credit clause does not require that the statutes of Alaska be given that effect.”

Thus, plaintiff had the right to elect under which statute he would proceed. He elected to proceed under the District statute. He filed notice with the District Compensation authorities that he elected to sue the general contractor as a third party tort-feasor pursuant to section 933 (a) of the District Compensation Act and also filed notice at the same time that he made claim for compensation for any deficiencies between the amount, if any, recovered in the suit and the amount provided by the District Act as compensation payable by plaintiff's employer, pursuant to section 933 (f) of the District statute. If it is held that the Maryland definition of a third party applies when plaintiff sues a third party under the District Compensation Act, not only would plaintiff be divested of a right vested in him by the District Compensation Act, but also his employer, the subcontractor, would be divested of a right vested in him by the District statute.

If the instant action is held to have been barred by the Maryland definition of a third party, the plaintiff could and would obtain compensation from his employer, the subcontractor, under section 933 (f) of the District Act and the employer would then be deprived of his right under the District Act to be reimbursed by the tort-feasor, the gen-

eral contractor, for the amount of compensation the employer paid plaintiff. That would be the result because the employer is subrogated to the rights of the employee against the tort-feasor to the extent of compensation that the employer pays to the employee. The employer would similarly be deprived of the right, vested in him under the District Act, if the employee had originally obtained compensation, which would have vested the employee's right against the tort-feasor in the employer.

Thus when defendant argues that it paid for compensation insurance in Maryland to be covered by the Maryland Compensation Act, which provided that compensation liability was the exclusive liability of defendant as a general contractor, and that for the District court to apply the District Compensation Act, which makes him subject to a third party action, takes his property without due process, the answer is that there is a conflict of interest here between the rights of the employee and his employer as vested in them by the District Act and the rights of the general contractor as set forth in the Maryland Act. The District has the right to enforce its own statutory provisions resolving these conflicts as the District Compensation Act deemed best in the public interest of the District.

II.

THE TRIAL COURT PROPERLY CHARGED THE JURY, AND PROPERLY REFUSED TO DIRECT A VERDICT FOR DEFENDANT, BECAUSE THERE WAS SUBSTANTIAL EVIDENCE OF NEGLIGENCE, AND THE ISSUES OF FACT AS TO THE ALLEGED CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF RISK REQUIRED SUBMISSION OF THE CASE TO THE JURY.

Defendant's argument that the court committed prejudicial error in instructing on primary negligence appears to concede that the court properly instructed that defendant owed a duty "to provide the plaintiff with a reasonably safe place to work under the circumstances." (App. 116) (Brief 26-209), but claims that the court should have

applied this general principle to the specific instant facts by further instruction that, the duty is limited on a construction project, by virtue of the fact that a workman assumes certain risks peculiar to the circumstances of construction. (Brief 27). Thus, defendant's argument confuses assumption of risk with primary negligence. As to both, the court gave a clear and full charge. Plaintiff submits that: (1) the court fully and clearly enunciated the applicable principles of primary negligence, assumption of risk and contributory negligence, in harmony with the very cases defendant cites, and then correctly applied these principles of law to the instant facts. Plaintiff's prayer, No. 10, restated in more cumbersome, detailed language, peppered with legal and factual errors, what the court did say in its clear and correct charge. (2) The legal principles of the cases defendant cites required submission of the instant case to the jury.

A. The court's charge correctly stated the applicable principles of law and then correctly applied these principles of law to the facts in evidence.

Defendant, in challenging the court's charge, quotes fragmented phases and sentences taken out of context. (Brief 26, 29-32, 34) We submit that the charge, considered in its entirety, was a fair and accurate statement of the law as applied to the instant facts and was in accord with the very cases defendant cites and quotes.

As to the duty owed to plaintiff, an employee of a subcontractor, by defendant, a general contractor in control of the premises, in relation to defendant's pole, which defendant, by its own workmen, had erected for its purposes, and which defendant's own grading operations had caused to be altered in depth, so that it was no longer embedded at a safe depth, the court said:

"The law says that it was the duty of the company to use reasonable care and caution in the installation of that pole and in its maintenance in order to make it reasonably safe for Mr. Mather to do his work.

"The responsibility of the defendant for the pole is not an absolute responsibility; it is not that of an insurer. The duty of defendant was to exercise the ordinary care and caution of a reasonably prudent person to keep the pole in a condition reasonably safe under all the circumstances in the case." (App. 111)

The court subsequently summarized the duty, stating:

"... (defendant) was under a duty to provide the plaintiff with a reasonably safe place to work under the circumstances. . . ." (App. 116)

The court, in its general charge had pointed out that negligence "is not an absolute term but a relative term", that conduct must be considered in the light of all the circumstances, and that "the amount of caution required will vary in accordance with the nature of the act and the surrounding circumstances." (App. 109-110), and that the mere occurrence of an accident does not infer someone was negligent. (App. 111).

The charge made it clear that the defendant's duty ended, in effect, where assumption of risk began, and that if plaintiff assumed the risk, or was contributorily negligent, he could not recover. (See App. 113, 114, 117).

In addition, after defining contributory negligence (App. 110-111), the court indicated that the standard of care to be applied was "the usual and customary practice of the linemen in climbing and cutting wires on an electric pole" and that plaintiff in his testimony had recognized that a "fair statement of one of the rules of safety" was "Before climbing poles, first assure yourself that the pole is strong enough to safely sustain your weight, and you are instructed that if you find that the plaintiff failed to follow this rule of safety and that this failure was a contributing cause of injury to the plaintiff, then your verdict must be for the defendant." (App. 117) Assurance "does not mean absolute assurance" but the exercise of ordinary care and caution, the court stated, indicating thereby that the

ordinarily careful and prudent lineman, not the super-cautious lineman was the criterion of prudence and care (App. 117).

B. The Court's charge correctly stated the law as enunciated by the cases defendant itself cites.

The construction cases cited by defendant, *Decatur v. Tompkins Co.*, 58 App. D. C. 102 (1928) and *Kuptz v. Sol-litt & Sons Const. Co.*, 88 F. 2d 532 (CCA 5, 1937), which involve extreme and inapposite fact situations, do not deny but expressly affirm that defendant owed plaintiff a duty. The court in *Kuptz* said:

“As an employee of the electrical subcontractor Kuptz was an invitee upon the premises to whom defendant (the general contractor) owed only the *duty to use due care*, consistent with all the circumstances, *to keep the premises in safe condition for plaintiff's use* for the purpose for which he was there. *Middleton v. P. Sanford Ross* (CCA), 213 F. 6, Defendant owed plaintiff as a subcontractor's employee no higher duty than it would owe it's own employee, which is to use reasonable care to furnish him with a reasonably safe place to work *and to warn him* of any unusual or latent dangers incident to his employment.” (Emphasis supplied).

Kuptz held only that the facts of that case showed the forms the workman was injured by reason of were made by another subcontractor, and that “as defendant neither erected the forms, nor held them out to plaintiff as a safe place to go upon”, and had not assumed any responsibility for the forms, defendant was not, under those facts, liable. But the *Kuptz* court expressly stated that where the defendant erects or provides or expressly or impliedly holds out as safe a place of work or instrumentality, such as a scaffold, which causes the injury, he is subject to liability, and the court cited numerous cases to that effect. Furthermore, it pointed out the defendant general contractor is liable where, as “In *Middleton v. P. Sanford Ross* (CCA),

213 F. 6, the defendant's employees were guilty of active negligence." The Decatur case expressly recognized the duty as stated in the *Kuptz* case—and as stated to the jury in the instant case—but found the employee assumed the risk under the special facts there: "He knew that board ends with nails projecting therefrom were often thrown upon the embankment from the upper floors of the building, and he had seen this happen upon the morning before the accident occurred", and after the accident he noticed a "truckload" of such board ends lying around. 58 App. D. C. at 104.

But where a defendant builder fixed a ladder in a particular position on a construction project, and impliedly invited a carpenter to use it during the construction work, the ladder, which had been negligently placed "was in the nature of a permanent and not a transitory and shifting position", since he undertook to furnish such scaffolding, or superintend its erection, and defendant was liable for negligence. *Thompson-Starret Co. v. Wilson*, 39 App. D. C. 211, 218 (1912). This Court also pointed out in the *Wilson* case that since some witnesses testified they did not observe the defect (dangerous proximity of a rung to a moulding projecting from the building) until an accident occurred, that "In the circumstances of the case, we think it was clearly a question for the jury whether the defective conditions producing the injury were known, or, in the exercise or reasonable care should have been known to the plaintiff." And in *Thompson-Starret Co. v. Warren*, 38 App. D. C. 310, 318 (1912), where a bricklayer, employed by defendant on a construction project, was injured by the collapse of a scaffold which had been erected by his employer and on which plaintiff was working, this Court affirmed a verdict for plaintiff because "The rule of law is well settled that it is the duty of an employer to provide reasonably safe structures and appliances for the use of his employee in carrying on the labor in which he is engaged, and this duty cannot be avoided by intrusting its performance to some other employee."

To the same effect see *Pierson v. Gohr*, 126 Md. 385, 94 A 1021 (1915) (Verdict for plaintiff, employee of a subcontractor, against defendant, general contractor, sustained; defendant liable for permitting dangerous condition which was not even created by defendant but by brick-laying subcontractor.)

And this duty of the general contractor to the employee of a subcontractor is the law and is enforced in courts throughout the United States. See cases collected in 20 ALR 2d 868 ("General contractor's liability for injuries to employees of other contractor's on the project").

The very language quoted by defendant from the *Decatur* case establishes that defendant was subject to liability. The evidence in the case at bar indicated the danger was not "open and obvious"; nor was it "merely transitory, due to no fault of plan or construction"; nor was it necessary to keep a building "in a safe condition at every moment of their work" to prevent this accident, nor was the unsafe condition attributable to fellow employees of the same employer, nor was negligent alteration of the embedding of the pole a "well-known incident of the work" which "plaintiff was fully aware of". The pole was an instrumentality furnished by the general contractor and was fixed in position, by the defendant, like the ladder in the *Wilson* case, and accordingly was not something in a "transitory" position; on the contrary, plaintiff's uncontradicted testimony was that such a pole, though put up for a temporary purpose, was, while in position, treated the same as a permanent pole. (App. 26) The plaintiff was not aware of the removal of soil immediately around the pole—the facts at the scene concealed it. (App. 33, 50, 60) One of defendant's own employees said the soil for a radius of 20 to 30 feet around the pole was not broken up, the day of the accident. (App. 60) Apparently, the digging around the pole had been done long before, then the earth around the pole had been trampled down by workmen and machinery and frozen hard, and, subsequently, soil had been

churned "off and on" in the general vicinity but not the soil for 20 to 30 feet around the pole. (App. 62, 60) Plaintiff, a fellow employee and defendant's own foreman said they looked and observed no dirt residue or marks on the pole, not even after the pole fell and was lying in the road, to show where the pole had been previously embedded (App. 14-15, 50, 66-67) One witness detected slight discoloration on the fallen pole but said he did not think a person about to climb or actually climbing the pole while it was upright would have detected the discoloration. (App. 43, 46). Plaintiff's fellow employee said he would, under the very same circumstances, have climbed the pole himself. (App. 50)

Plaintiff had checked the pole and found it was safely embedded after it had been initially installed by defendant and he had safely climbed the pole to affix the wires. (App. 12-13, 57-58) A month or two later, he was led to believe, not only by the physical facts which, as pointed out above, concealed the defendant's intervening alteration of the pole's embedding, but also by defendant's order to take the wires down (which was normally done by climbing the pole), and by the understanding that defendant would itself thereafter uproot and remove the pole, that the pole was still safely embedded. (App. 57-58, 42) Moreover, defendant's foreman pointed out the pole, from which the wires were to be removed, to plaintiff, who had already donned his climbing gear. (App. 14, 16, 57) Defendant knew by its foreman that plaintiff was about to ascend the pole but remained silent. All this constituted an implied assurance of safety—whereas, defendant knew, or must be held to have knowledge that defendant itself had unearthed the pole bedding reducing it from 4-5 feet to 6-8 inches, and that, therefore, the pole was unsafe to climb. In fact, it might well have toppled without the added weight of plaintiff, and caused widespread injury to workmen in the area. The attached wires, according to the evidence, were never intended to support the pole; they were solely used as electrical conduits. (App. 14)

Prevention of this accident required no elaborate procedures that would hamper construction progress. Defendant owed the simple duty to plaintiff, who had been working on inside electrical work just prior to the accident, and so was not conversant with the details of defendant's grading, to warn him of the latent danger *created by defendant* and not to impliedly hold it out as safe to climb and stand by silently while he ascended. Such duty to warn was expressly stated as incumbent upon defendant in such circumstances, where the danger was not open and obvious, by the *Kuptz* case cited by defendant. (See quotation, *supra*, p. 42).

Chasen, Colonial's foreman testified that defendant's employees did the grading of the land, around the building, which was the land where the pole was located (App. 39) and defendant's foreman Propst, stated that the grading in the area of the pole, as well as the removal of the pole, was in his "jurisdiction" at the time of the accident (App. 61). Defendant offered no evidence to contradict plaintiff's evidence that defendant had done the grading around the pole; nor did defendant, in its prayers, raise an issue of fact as to whether defendant or someone else did the grading, around the pole; nor did defendant in any other way raise the point at the trial, even in closing argument, and therefore, this diversionary afterthought comes too late on this appeal.

The fact is defendant offered no evidence to rebut plaintiff's strong *prima facie* case of negligence. Defendant called but one witness, plaintiff's employer, McKenney, who was not present at the time of the accident.

The court's comment that the pole was not embedded in concrete, read in context, (App. 113-114) was suggested as a consideration in determining if plaintiff should have shaken the pole, not a suggestion the defendant should have placed it in concrete. (Brief 30) No one so construed it at the trial; defendant did not object to this observation at the trial, and the context refutes defendant's construction.

As to the linemen cases cited by defendant, *Consolidated Gas Co. v. Chambers*, 112 Md. 324 (1910) expressly states in the very quotation reiterated in two different parts of defendant's brief, (Brief 28, 31), that even where the facts establish that a plaintiff who is regularly employed by a company as an experienced, full-time linemen, and where the facts establish that the company has no system of inspection (the facts differed in the instant case), that even then he can hold the company liable for injury where "*there was some defect in them (the poles) when they were originally placed in position*". Thus, in *Ault v. Nebraska Telephone Co.* (Neb.) 118 N. W. 73 (1908), though the lineman might have detected the defect in the pole, the master was liable for negligence of employees who defectively set up the pole. Where a pole was not set deeply enough in the ground, the lineman was held not to have assumed the risk, because it is not a risk of the profession that the master will do an act of negligence, and the master has a duty to warn of the danger his negligence created. *Bland v. Shreveport Belt R. Co.*, 48 La. App. 1057, *Kelly v. Erie T. & T. Co.*, 34 Minn. 321, 25 N. W. 706 (1885); *Riker v. N. Y. O. & W. Ry. Co.*, 64 App. Div. 357, (1901) 72 N. Y. Sup. 168, and *Eastern Kentucky Home Telephone Co. v. Mellon*, 116 S. W. 709 (1909), *McDonald v. Postal Tel. Co.*, 22 R. I. 131, 46 A. 407 (1900). The fact situations in these cases are on all fours with the instant case because it is just as negligent for the defendant to rearrange the earth around the pole so it is not deeply enough embedded as to initially embed it at an insufficient depth.

Furthermore, the defendant was not hired by his employer on this project as a lineman, (in which type of work his experience had been limited), but as an electrician, and the employer testified, uncontradicted, that linemen never were employed on such projects, which custom of the trade should have been known to defendant. (App. 82, 77, 42) See *Holden v. Gary Tel. Co.* (Minn.), 122 N. W. 1018 and *Clark v. Johnson County Hel. Co.* (Iowa), 123 N. W. 327.

The *Consolidated* case expressly said that "whether it is incumbent upon the master or servant to perform such a duty (of inspection) is usually a question of fact depending upon . . . the circumstances."

As to defendant's contention that the court failed to instruct as to whether plaintiff had a duty to inspect and that the court failed to relate the standard of conduct to that of a reasonably prudent linesman, the court did in fact give just such an instruction. (See discussion, *supra*, p. 41 and App. 117) If the court had not said that the instruction did not mean absolute assurance, the implication would have been that plaintiff could never recover if the pole fell for any reason, since he never would be on it when it fell if he had absolutely assured himself it was safe.

As the New York court said in *Riker v. New York O. & W. Ry. Co.*, *supra*:

"The evidence is undisputed that the proper manner to erect such a pole as the one in question, about 25 feet in height, was to imbed it at least 5 feet deep in the earth. This pole stood on the side of a bank, and was only 22 inches below the soil on one side, and 18 on the other; the difference representing the slope of the bank.

"It was the duty of the defendant to have equipped its telegraph system, in the first instance, in such a manner that the poles would furnish a reasonably safe place for its employees to work upon in stringing, repairing, altering, or removing the wires; . . . There was accordingly no error committed by the court in permitting the jury to find an inadequate setting of the pole from all the evidence in the case. . . ." (Emphasis supplied)

The court correctly charged the jury as to primary negligence, contributory negligence and assumption of risk, and correctly and fairly applied those legal principles to the instant facts. It would have been reversible error for the court to have directed a verdict for the defendant since there was substantial evidence of negligence and the issues of fact as to the alleged contributory negligence and as-

sumption of risk required submission of the case to the jury.

CONCLUSION

Plaintiff, as a District resident hired by a District subcontractor in the District, properly elected to pursue his right under the District Compensation Act to sue the general contractor as a third-party tort-feasor. If the Maryland Compensation Act was in conflict with the District Act, the District Court for the District of Columbia was not required, under the full faith and credit clause, to substitute for the District Act the law of a foreign jurisdiction. There was substantial evidence to go to the jury and to support the jury's verdict for plaintiff that plaintiff's injuries were caused by defendant's negligence. The court properly refused to direct a verdict for defendant and correctly charged the jury as to negligence, contributory negligence and assumption of risk.

For the foregoing reasons and authorities relied upon, it is respectfully submitted that the judgment below should be affirmed.

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